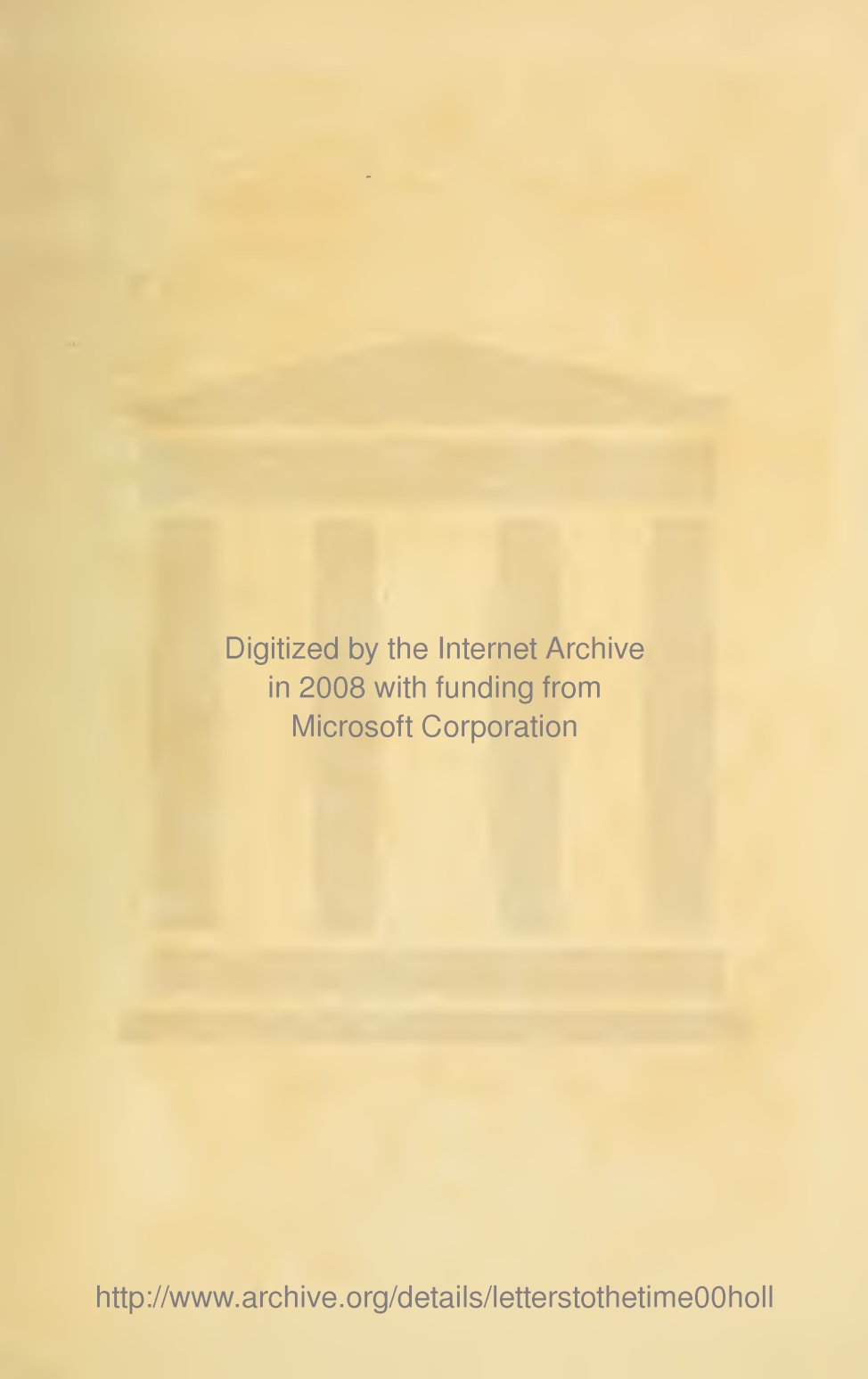

LETTERS

UPON

WAR AND NEUTRALITY

(1881-1909)

LETTERS TO "THE TIMES"

UPON

WAR AND NEUTRALITY

(1881–1909)

WITH SOME COMMENTARY

BY

THOMAS ERSKINE HOLLAND

K.C., D.C.L., F.B.A.

CHICHELE PROFESSOR OF INTERNATIONAL LAW,
VICE-PRÉSIDENT DE L'INSTITUT DE DROIT INTERNATIONAL, ETC., ETC.

LONGMANS, GREEN, AND CO.
39 PATERNOSTER ROW, LONDON
NEW YORK, BOMBAY, AND CALCUTTA
1909

PREFACE

For a good many years past I have been allowed to comment, in letters to *The Times*, upon points of International Law, as they have been raised by the events of the day. These letters have been fortunate enough to attract some attention, both at home and abroad, and requests have frequently reached me that they should be rendered more easily accessible than they can be in the files of the newspaper in which they originally appeared.

I have, accordingly, thought that it might be worth while to select, from a greater number, such of my letters as bear upon those questions of War and Neutrality of which so much has been heard in recent years, and to group them for republication, with some elucidatory matter (more especially with references to changes introduced by the Geneva Convention of 1906, The Hague Conventions of 1907, and the Declaration of London of the present year) under the topics to which they respectively relate.

The present volume has been put together in accordance with this plan; and my best thanks are due to the

proprietors of *The Times* for permitting the reissue of the letters in a collected form. Cross-references and a full Index will, I hope, to some extent remove the difficulties which might otherwise be caused by the fragmentary character, and the chances of repetition, inseparable from such a work.

T. E. H.

Eggishorn, Switzerland,
September 14, 1909.

*** It may be right here to mention that, though most of the Conventions of 1907, to which so frequent reference is made in the following pages, have been, subject to various reservations, already signed by the Powers represented at the Second Peace Conference, they will in no case be formally ratified till towards the end of the present year. The Declaration of 1909 has been signed by all the Powers present at the London Conference, but is not likely just yet to be ratified by any of them. Great Britain cannot well ratify any of The Hague Conventions which require legislation to carry them into effect (*e.g.* probably Nos. 1, 5, 10, 12, 13), or the Declaration of London, until it shall have been found possible to pass the necessary Acts of Parliament.

CONTENTS

CHAPTER I

CHAPTER II

SECTION 3

SECTION 4

SECTION 5

SECTION 6

SECTION 7

SECTION 8

CHAPTER V

SECTION 4

SECTION 5

SECTION 6

CHAPTER I

MEASURES SHORT OF WAR FOR THE SETTLEMENT OF INTERNATIONAL CONTROVERSIES

Section 1

Friendly Measures

Of the two letters which follow, the first was suggested by a petition presented in October, 1899, to the President of the United States, asking him to use his good offices to terminate the war in South Africa ; the second by discussions as to the advisability of employing, for the first time, an International Commission of Enquiry, for the purpose of ascertaining the facts of the lamentable attack perpetrated by the Russian fleet upon British fishing vessels off the Dogger Bank, on October 21, 1905. The Commission sat from January 19 to February 25, 1905, and its report was the means of terminating a period of great tension in the relations of the two Powers concerned (see *Parl. Paper*, Russia, 1905, No. 3) : this letter deals also with Arbitration, under The Hague Convention of 1899.

It may be worth while here to point out that besides direct negotiation between the Powers concerned, four friendly methods for the settlement of questions at issue between them are now recognised, *viz.* (1) Good offices and mediation of third Powers ;

(2) "Special mediation"; (3) "International Commissions of Enquiry"; (4) Arbitration. All four are recommended by The Hague Convention of 1899 "For the Peaceful Settlement of International Disputes" (by which, indeed, (2) and (3) were first suggested), as also by the amended re-issue of that convention in 1907. It must be noticed that resort to any of these methods remains entirely discretionary, so far as any rule of International Law is concerned; all efforts to render it universally and unconditionally obligatory having, perhaps fortunately, failed.

THE PETITION TO THE PRESIDENT OF THE UNITED STATES

Sir,—It seems that a respectably, though perhaps thoughtlessly, signed petition was on Thursday presented to President McKinley, urging him to offer his good offices to bring to an end the war now being waged in South Africa. From the *New York World* cablegram, it would appear that the President was requested to take this step "in accordance with Article 3 of the protocol of the Peace Conference at The Hague." The reference intended is doubtless to the *Convention pour le règlement pacifique des conflits internationaux*, prepared at the Conference [of 1899], Article 3 of which is to the following effect:—

"Les Puissances signataires jugent utile qu'une ou plusieurs Puissances étrangères au conflit offrent de leur propre initiative, en tant que les circonstances, s'y prêtent, leurs bons offices ou leur médiation aux États en conflit.

"Le droit d'offrir les bons offices ou la médiation appartient aux Puissances étrangères au conflit, même pendant le cours des hostilités.

"L'exercice de ce droit ne peut jamais être considéré par l'une ou l'autre des parties en litige comme un acte peu amical."

Several remarks are suggested by the presentation of this petition:—

(1) One might suppose from the glib reference here and elsewhere made to The Hague Convention, that this convention is already in force, whereas it is, in the case of most, if not all, of the Powers represented at the conference, a mere unratified draft, under the consideration of the respective Governments.

(2) The article, if it were in force, would impose no duty of offering good offices, but amounts merely to the expression of opinion that an offer of good offices is a useful and unobjectionable proceeding, in suitable cases (*en tant que les circonstances s'y prêtent*). It cannot for a moment be supposed that the President would consider that an opportunity of the kind contemplated was offered by the war in South Africa.

(3) One would like to know at what date, if at all, the Prime Minister of the British colony of the Cape was pleased, as is alleged, to follow the lead of the Presidents of the two Boer Republics in bestowing his grateful approval upon the petition in question.

Your obedient servant,

T. E. Holland.

Oxford, October 28 (1899).

Par. 2 (1).—The Convention of 1899 was ratified by Great Britain on September 4, 1900; and between that year and 1907 practically all civilised Powers ratified or acceded to it. It is now in course of being superseded by The Hague Convention, No. i. of 1907, which reproduces Article 3 of the older Convention, inserting, however, after the word "utile," the words "et désirable."

Ib. (2).—On March 5, 1900, the two Boer Republics proposed that peace should be made on terms which included the recognition of their independence. Great Britain having, on March 11,

declared such recognition to be inadmissible, the European Powers which were requested to use their good offices to bring this about declined so to intervene. The President of the United States, however, in a note delivered in London on March 13, went so far as to "express an earnest hope that a way to bring about peace might be found," and to say that he would aid "in any friendly manner to bring about so happy a result." Lord Salisbury, on the following day, while thanking the United States Government, replied that "H.M. Government does not propose to accept the intervention of any Power in the South African War." Similar replies to similar offers had been made by both France and Prussia in 1870, and by the United States in 1898.

COMMISSIONS OF ENQUIRY AND THE HAGUE CONVENTION

Sir,—It is just now especially desirable that the purport of those provisions of The Hague Convention "for the peaceful settlement of international controversies" which deal with "international commissions of enquiry" should be clearly understood. It is probably also desirable that a more correct idea should be formed of the effect of that convention, as a whole, than seems to be generally prevalent. You may, therefore, perhaps, allow me to say a few words upon each of these topics.

Article 9 of the convention contains an expression of opinion to the effect that recourse to an international commission of enquiry into disputed questions of fact would be useful. This recommendation is, however, restricted to "controversies in which neither honour nor essential interests are involved," and is further limited by the phrase "so far as circumstances permit." Two points are here deserving of notice.

In the first place, neither "the honour and vital interests clause," as seems to be supposed by your correspondent Mr. Schidrowitz, nor the clause as to circumstances permitting, is in any way modified by the article which follows. Article 10 does not enlarge the scope of Article 9, but merely indicates the procedure to be followed by Powers desirous of acting under it. In the second place, it is wholly unimportant whether or no the scope of Article 9 is enlarged by Article 10. The entire liberty of the Powers to make any arrangement which may seem good to them for clearing up their differences is neither given, nor impaired, by the articles in question, to which the good sense of the Conference declined to attach any such obligatory force as had been proposed by Russia. It may well be that disputant Powers may at any time choose to agree to employ the machinery suggested by those articles, or something resembling it, in cases of a far more serious kind than those to which alone the convention ventured to make its recommendation applicable; and this is the course which seems to have been followed by the Powers interested with reference to the recent lamentable occurrence in the North Sea.

As to the convention as a whole, it is important to bear in mind that, differing in this respect from the two other conventions concluded at The Hague, it is of a non-obligatory character, except in so far as it provides for the establishment of a permanent tribunal at The Hague, to which, however, no Power is bound to resort. It resembles not so much a treaty as a collection of "pious wishes' (*voeux*), such as those which were also adopted at The Hague. The operative phrases of most usual occurrence in the convention are, accordingly, such as "jugent utile"; "sont

d'accord pour recommander" ; "est reconnu comme le moyen le plus efficace" ; "se réservent de conclure des accords nouveaux, en vue d'étendre l'arbitrage obligatoire à tous les cas qu'elles jugeront possible de lui soumettre."

It is a matter for rejoicing that, in accordance with the suggestion contained in the phrase last quoted, so many treaties, of which that between Great Britain and Portugal is the most recent, have been entered into for referring to The Hague tribunal "differences of a juridical nature, or such as relate to the interpretation of treaties ; on condition that they do not involve either the vital interests or the independence or honour of the two contracting States." Such treaties, conforming as they all do to one carefully defined type, may be productive of much good. They testify to, and may promote, a very widely spread *entente cordiale*, they enhance the prestige of the tribunal of The Hague, and they assure the reference to that tribunal of certain classes of questions which might otherwise give rise to international complications. Beyond this it would surely be unwise to proceed. It is beginning to be realised that what are called "general" treaties of arbitration, by which States would bind themselves beforehand to submit to external decision questions which might involve high political issues, will not be made between Powers of the first importance ; also, that such treaties, if made, would be more likely to lead to fresh misunderstandings than to secure the peaceful settlement of disputed questions.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, November 21 (1904).

Pars. 1–3.—The topic of "Commissions of Enquiry," which occupied Arts. 9–13 of the Convention of 1899 "For the Peaceful Settlement of International Disputes," is more fully dealt with in Arts. 9–36 of the Convention as amended in 1907.

Par. 4.—The amended Convention, as a whole, is still, like its predecessor, purely facultative. The Russian proposal to make resort to arbitration universally obligatory in a list of specified cases, unless when the "vital interests or national honour" of States might be involved, though negatived in 1899, was renewed in 1907, in different forms, by several Powers, which eventually concurred in supporting the Anglo-Portuguese-American proposal, according to which, differences of a juridical character, and especially those relating to the interpretation of treaties, are to be submitted to arbitration, unless they affect the vital interests, independence, or honour, of the States concerned, or the interests of third States; while all differences as to the interpretation of treaties relating to a scheduled list of topics, or as to the amount of damages payable, where liability to some extent is undisputed, are to be so submitted without any such reservation. This proposal was accepted by thirty-two Powers, but as nine Powers opposed it, and three abstained from voting, failed to become a convention. The delegates to the Conference of 1907 went, however, so far as to include in their "Final Act" a statement to the effect that they were unanimous: (1) "in recognising the principle of obligatory arbitration"; (2) "in declaring that certain differences, and, in particular, such as relate to the interpretation and application of the provisions of International Conventions, are suitable for being submitted to obligatory arbitration, without any reservations."

Par. 5.—The Convention between France and Great Britain, concluded on October 14, 1903, for five years, and renewed on October 14, 1908, for a like period, by which the parties agree to submit to The Hague tribunal any differences which may arise between them, on condition "that they do not involve either the vital interests, or the independence, or honour of the two contracting States, and that they do not affect the interests of a third Power," has served as a model, or "common form," for a very large number of conventions to the same effect, entered into between one State and another. The Convention of April 11, 1908, between Great Britain and the United States is substantially of this type.

Section 2

Reprisals.

The four letters next following were suggested by the ambiguous character of the blockades instituted by France against Siam in 1893, by the Great Powers against Crete in 1897, and by Great Britain, Germany, and Italy against Venezuela in 1902. The object, in each case, was to explain the true nature of the species of reprisals known as "Pacific Blockade," and to point out the difference between the consequences of such a measure and those which result from a "Belligerent Blockade." A fifth letter, written with reference to the action of the Netherlands against Venezuela in 1908, emphasises the desirability of more clearly distinguishing between war and reprisals. On the various applications of a blockade in time of peace, see the author's *Studies in International Law*, pp. 130–150.

THE BLOCKADE OF THE MENAM

Sir,—Upon many questions of fact and of policy involved in the quarrel between France and Siam it may be premature as yet to expect explicit information from the French Government; but there should not be a moment's doubt as to the meaning of the blockade which has probably by this time been established.

Is France at war with Siam? This may well be the case, according to modern practice, without any formal declaration of war; and it is, for international purposes, immaterial whether the French Cabinet, if it has commenced a war without the sanction of the Chambers, has or has not thereby violated the French Constitution. If there is a war, and if the blockade, being effective, has been duly notified to the neutral Powers, the vessels of those Powers are, of course, liable to be visited, and, if found

to be engaged in breach of the blockade, to be dealt with by the French Prize Courts.

Or is France still at peace with Siam, and merely putting upon her that form of pressure which is known as "pacific blockade"?

In this case, since there is no belligerency, there is no neutrality, and the ships of States other than that to which the pressure is being applied are not liable to be interfered with. The particular mode of applying pressure without going to war known as "pacific blockade" dates, as is well known, only from 1827. It has indeed been enforced, by England as well as by France, upon several occasions, against the vessels of third Powers; but this practice has always been protested against, especially by French jurists, as an unwarrantable interference with the rights of such Powers, and was acknowledged by Lord Palmerston to be illegal. The British Government distinctly warned the French in 1884 that their blockade of Formosa could be recognised as affecting British vessels only if it constituted an act of war against China; and when the Great Powers in 1886 proclaimed a pacific blockade of the coasts of Greece they carefully limited its operation to ships under the Greek flag.

The subject has been exhaustively considered by the Institut de Droit International, which, at its meeting at Heidelberg in 1887, arrived at certain conclusions which may be taken to express the view of learned Europe. They are as follows:—

"L'établissement d'un blocus en dehors de l'état de guerre ne doit être considéré comme permis par le droit des gens que sous les conditions suivantes:—

"1. Les navires de pavillon étranger peuvent entrer librement malgré le blocus.

"2. Le blocus pacifique doit être déclaré et notifié officiellement, et maintenu par une force suffisante.

"3. Les navires de la puissance bloquée qui ne respectent pas un pareil blocus peuvent être séquestrés. Le blocus ayant cessé, ils doivent être restitués avec leurs cargaisons à leurs propriétaires, mais sans de dommagement à aucun titre."

If the French wish to reap the full advantages of a blockade of the Siamese coast they must be prepared, by becoming belligerent, to face the disadvantages which may result from the performance by this country of her duties as a neutral.

I am, Sir, your obedient servant,

T. E. Holland.

Athenæum Club, July 26 (1893).

PACIFIC BLOCKADE

Sir,—The letter signed "M." in your issue of this morning contains, I think, some statements which ought not to pass uncorrected. A "blockade" is, of course, the denial by a naval squadron of access for vessels to a defined portion of the coasts of a given nation. A "pacific blockade" is one of the various methods—generically described as "reprisals," such as "embargo," or seizure of ships on the high seas—by which, without resort to war, pressure, topographically or otherwise limited in extent, may be put upon an offending State. The need for pressure of any kind is, of course, regrettable, the only question being whether such limited pressure be not more humane to the nation which experiences it, and less distasteful to the nation which exercises

it, than is the letting loose of the limitless calamities of war.

The opinion of statesmen and jurists upon this point has undergone a change, and this because the practice known as "pacific blockade" has itself changed. The practice, which is comparatively modern, dating only from 1827, was at first directed against ships under all flags, and ships arrested for breach of a pacific blockade were at one time confiscated, as they would have been in time of war. It has been purged of these defects as the result of discussions, diplomatic and scientific. As now understood, the blockade is enforced only against vessels belonging to the "quasi-enemy," and even such vessels, when arrested, are not confiscated, but merely detained till the blockade is raised. International law does not stand still, and having some acquaintance with Continental opinion on the topic under consideration, I read with amazement "M.'s" assertion that "the majority in number," "the most weighty in authority" of the writers on international law "have never failed to protest against such practices as indefensible in principle." The fact is that the objections made by, *e.g.* Lord Palmerston, in 1846, and by several writers of text-books, to pacific blockade, had reference to the abuses connected with the earlier stages of its development. As directed only against the ships of the "quasi-enemy," it has received the substantially unanimous approbation of the Institut de Droit International at Heidelberg in 1887, after a very interesting debate, in which the advocates of the practice were led by M. Perels, of the Prussian Admiralty, and its detractors by Professor Geffken. It is true that in an early edition of his work upon international

law my lamented friend, Mr. Hall, did use the words attributed to him by "M.": "It is difficult to see how a pacific blockade is justifiable." But many things, notably Lord Granville's correspondence with France in 1884 and the blockade of the Greek coast in 1886, have occurred since those words were written. If "M." will turn to a later edition of the work in question he will see that Mr. Hall had completely altered his opinion on the subject, or rather that, having disapproved of the practice as unreformed, he blesses it altogether in its later development. With reference to the utility of the practice, I should like to call the attention of "M." to a passage in the latest edition of Hall's book, which is perhaps not irrelevant to current politics :—

"The circumstances of the Greek blockade of 1886 show that occasions may occur in which pacific blockade has an efficacy which no other measure would possess. The irresponsible recklessness of Greece was endangering the peace of the world; advice and threats had been proved to be useless; it was not till the material evidence of the blockade was afforded that the Greek imagination could be impressed with the belief that the majority of the Great Powers of Europe were in earnest in their determination that war should be avoided."

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, March 5 (1897).

THE VENEZUELAN CONTROVERSY

Sir,—Apart from the practical difficulty, so ably described by Sir Robert Giffen in your issue of this morning, of obtaining compensation in money from a State which seems to be at once bankrupt and in the throes of revolution, not a few questions of law and policy, as to which misunderstanding is more than probable, are raised from day to day

by the action of the joint squadrons in Venezuelan waters. It may therefore be worth while to attempt to disentangle the more important of these questions from the rest, and to indicate in each case the principles involved.

1. Are we at war with Venezuela? Till reading the reports of what passed last night in the House of Commons, I should have replied to this question unhesitatingly in the negative. Most people whose attention has been directed to such matters must have supposed that we were engaged in the execution of "reprisals," the nature and legitimacy of which have long been recognised by international law. They consist, of course, in the exertion of pressure, short of war; over which they possess the following advantages:—They are strictly limited in scope; they cease, when their object has been attained, without the formalities of a treaty of peace; and, no condition of "belligerency" existing between the Powers immediately concerned, third Powers are not called upon to undertake the onerous obligations of "neutrality." The objection sometimes made to reprisals, that they are applicable only to the weaker Powers, since a strong Power would at once treat them as acts of war, is indeed the strongest recommendation of this mode of obtaining redress. To localise hostile pressure as far as possible, and to give to it such a character as shall restrict its incidence to the peccant State, is surely in the interest of the general good. That the steps taken are such as would probably, between States not unequally matched, cause an outbreak of war cannot render them inequitable in cases where so incalculable an evil is unlikely to follow upon their employment.

2. The justification of a resort either to reprisals or to war,

in any given case, depends, of course, upon the nature of the acts complained of, and upon the validity of the excuses put forward either for the acts themselves, or for failure to give satisfaction for them. The British claims against Venezuela seem to fall into three classes. It will hardly be disputed that acts of violence towards British subjects or vessels, committed under State authority, call for redress. Losses by British subjects in the course of civil wars would come next, and would need more careful scrutiny (on this point the debates and votes of the Institut de Droit International, at its meeting at Neuchâtel in 1900, may be consulted with advantage). Last of all would come the claims of unpaid bondholders, as to which Mr. Balfour would seem to endorse, in principle, the statement made in 1880 by Lord Salisbury, who, while observing that "it would be an extreme assertion to say that this country ought never to interfere on the part of bondholders who have been wronged," went on to say that "it would be hardly fair if any body of capitalists should have it in their power to pledge the people of this country to exertions of such an extensive character. . . . They would be getting the benefit of an English guarantee without paying the price of it."

3. Reprisals may be exercised in many ways; from such a high-handed act as the occupation of the Principalities by Russia in 1853, to such a mere seizure of two or three merchant vessels as occurred in the course of our controversy with Brazil in 1861. In modern practice, these measures imply a temporary sequestration, as opposed to confiscation or destruction, of the property taken. In the belief that reprisals only were being resorted to against Venezuela, one was therefore glad to hear that the sinking of gunboats by

the Germans had been explained as rendered necessary by their unseaworthiness.

4. Reprisals should also, according to the tendency of modern opinion and practice, be so applied as not to interfere with the interests of third Powers and their subjects. This point has been especially discussed with reference to that species of reprisal known as a "pacific blockade," of which some mention has been made in the present controversy. The legitimacy of this operation, though dating only from 1827, if properly applied, is open to no question. Its earlier applications were, no doubt, unduly harsh, not only towards the peccant State, but also towards third States, the ships of which were even confiscated for attempting to break a blockade of this nature. Two views on this subject are now entertained—viz. (1) that the ships of third Powers breaking a pacific blockade may be turned back with any needful exertion of force, and, if need be, temporarily detained; (2) that they may not be interfered with. The former view is apparently that of the German Government. It was certainly maintained by M. Perels, then as now, the adviser to the German Admiralty, during the discussion of the subject by the Institut de Droit International at Heidelberg in 1887. The latter view is that which was adopted by the Institut on that occasion. It was maintained by Great Britain, with reference to the French blockade of Formosa in 1884; was acted on by the allied Powers in the blockade of the coast of Greece, instituted in 1886; and is apparently put forward by the United States at the present moment.

5. If, however, we are at war with Venezuela (as will, no doubt, be the case if we proclaim a belligerent blockade of the coast, and may at any moment occur, should Venezuela

choose to treat our acts, even if intended only by way of reprisals, as acts of war), the situation is changed in two respects: (1) the hostilities which may be carried on by the allies are no longer localised, or otherwise limited, except by the dictates of humanity; (2) third States become *ipso facto* "neutrals," and, as such, subject to obligations to which up to that moment they had not been liable. Whatever may have previously been the case, it is thenceforth certain that their merchant vessels must respect the, now belligerent, blockade, and are liable to visit, search, seizure, and confiscation if they attempt to break it.

6. If hostile pressure, whether by way of reprisals or of war, is exercised by the combined forces of allies, the terms on which this is to be done must obviously be arranged by previous agreement. More especially would this be requisite where, as in the case of Great Britain and Germany, different views are entertained with reference to the acts which are permissible under a "pacific blockade."

7. When, besides the Power, or Powers, putting pressure upon a given State, with a view to obtaining compensation for injuries received from it, other Powers, though taking no part in what is going on, give notice that they also have claims against the same offender, delicate questions may obviously arise between the creditors who have and those who have not taken active steps to make their claims effective. In the present instance, France is said to assert that she has acquired a sort of prior mortgage on the assets of Venezuela; and the United States, Spain, and Belgium declare themselves entitled to the benefit of the "most-favoured-nation clause" when those assets are made available for creditors. What principles are applicable to the

solution of the novel questions suggested by these competing claims ?

8. It is satisfactory to know, on the highest authority, that the "Monroe doctrine" is not intended to shield American States against the consequences of their wrong-doing; since the cordial approval of the doctrine which has just been expressed by our own Government can only be supposed to extend to it so far as it is reasonably defined and applied. Great Britain, for one, has no desire for an acre of new territory on the American continent. The United States, on the other hand, will doubtless readily recognise that, if international wrongs are to be redressed upon that continent, aggrieved European Powers may occasionally be obliged to resort to stronger measures than a mere embargo on shipping, or the blockade (whether "pacific" or "belligerent") of a line of coast.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, December 18 (1902).

THE VENEZUELA PROTOCOL

Sir,—The close (for the present, at any rate) of the Venezuelan incident will be received with general satisfaction. One of the articles of the so-called "protocol" of February 13 seems, however, to point a moral which one may hope will not be lost sight of in the future—*viz.* the desirability of keeping unblurred the line of demarcation between such unfriendly pressure as constitutes "reprisals" and actual war.

After all that has occurred—statements in Parliament,

action of the Governor of Trinidad in bringing into operation the dormant powers of the Supreme Court of the island as a prize Court, &c., one would have supposed that there could be no doubt, though no declaration had been issued, that we were at war with Venezuela.

Our Government has, therefore, been well advised in providing for the renewal of any treaty with that Power which may have been abrogated by the war; but it is curious to find that the article (7) of the protocol which effects this desirable result begins by a recital to the effect that "it may be contended that the establishment of a blockade of the Venezuelan ports by the British naval forces has *ipso facto* created a state of war between Great Britain and Venezuela."

It is surely desirable that henceforth Great Britain should know, and that other nations should at least have the means of knowing, for certain, whether she is at war or at peace.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, February 17 (1903).

WAR AND REPRISALS

Sir,—Professor Westlake's interesting letter as to the measures recently taken by the Netherlands Government in Venezuelan waters opportunely recalls attention to a topic upon which I addressed you when, six years ago, our own Government was similarly engaged in putting pressure upon Venezuela—*viz.* the desirability of drawing a clear line between war and reprisals. Perhaps I may now be

allowed to return, very briefly, to this topic, with special reference to Professor Westlake's remarks.

In any discussion of the questions involved, we ought, I think, clearly to realise that The Hague Convention, No. 3 of 1907, has no application to any measures not amounting to war. The "hostilities" mentioned in Article 1 of the Convention are, it will be observed, exclusively such as must not commence without either a "declaration of war," or "an ultimatum with a conditional declaration of war"; and Article 2 requires that the "state of war," thus created, shall be notified to "neutral Powers." There are, of course, no Powers answering to this description till war has actually broken out. Neutrality presupposes belligerency. Any other interpretation of the Convention would, indeed, render "pacific blockades" henceforth impossible.

In the next place, we must at once recognise that the application of the term "reprisals," whatever may have been its etymological history, must no longer be restricted to seizure of property. It has now come to cover, and it is the only term which does cover generically, an indeterminate list of unfriendly acts, such as embargo, pacific blockade, seizure of custom-houses, and even occupation of territory, to which resort is had in order to obtain redress from an offending State without going to war with it. The pressure thus exercised, unlike the unlimited *licentia laedendi* resulting from a state of war, is localised and graduated. It abrogates no treaties, and terminates without a treaty of peace. It affects only indirectly, if at all, the rights of States which take no part in the quarrel.

The questions which remain for consideration would seem to be the following:—

1. Would it be feasible to draw up a definite list of the measures which may legitimately be taken with a view to exercising pressure short of war?—I think not. States differ so widely in offensive power and vulnerability that it would be hardly advisable thus to fetter the liberty of action of a State which considers itself to have been injured.

2. Ought it to be made obligatory that acts of reprisal should be preceded, or accompanied, by a notification to the State against which they are exercised that they are reprisals and not operations of war?—This would seem to be highly desirable; unless, indeed, it can be assumed that, in pursuance of The Hague Convention of 1907, no war will henceforth be commenced without declaration.

3. Ought a statement to the like effect to be made to nations not concerned in the quarrel?—This would, doubtless, be convenient, unless the non-receipt by them of any notification of a "state of war," in pursuance of the Convention, could be supposed to render such a statement superfluous.

On the ambiguous character sometimes attaching to reprisals as now practised, I may perhaps refer to an article in the *Law Quarterly Review* for 1903, entitled "War Sub Modo."

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, December 26 (1908).

The operations against Venezuela which were closed by the protocol of February 13, 1903, had given rise to the enunciation of the so-called "Drago doctrine," in a despatch, addressed on December 29 of the preceding year, by the Argentine Minister for Foreign Affairs to the Government of the United

States, which asserts that "public indebtedness cannot justify armed intervention by a European Power, much less material occupation by it of territory belonging to any American nation." The reply of the United States declined to carry the "Monroe doctrine" to this length, citing the passage in President Roosevelt's message in which he says: "We do not guarantee any State against punishment, if it misconducts itself, provided such punishment does not take the form of the acquisition of territory by any non-American Power."

It is, however, now provided by The Hague Convention, No. ii. of 1907, that "the contracting Powers have agreed not to have recourse to armed force for the recovery of contractual debts, claimed from the Government of a country by the Government of another country, as being due to its subjects. This stipulation shall have no application when the debtor State declines, or leaves unanswered, an offer of arbitration, or, having accepted it, renders impossible the conclusion of the terms of reference (*compromis*), or, after the arbitration, fails to comply with the arbitral decision."

CHAPTER II

STEPS TOWARDS THE CODIFICATION OF THE LAWS OF WAR

A LARGE body of written International Law, with reference to the conduct of warfare, has been, in the course of the last half-century, and, more especially, in quite recent years, called into existence by means of general conventions or declarations, of which mention must frequently be made in the following pages. Such are :—

(i.) With reference to war, whether on land or at sea : the Declaration of St. Petersburg, of 1868, as to explosive bullets; the three Hague Declarations, of 1899–1907, as to projectiles from balloons, projectiles spreading dangerous gases, and expanding bullets ; The Hague Convention No. iii. of 1907, as to Declaration of War.

(ii.) With reference only to war on land : the Geneva Convention of 1906 (superseding that of 1864) as to the sick and wounded ; The Hague Conventions, Nos. iv. and v. of 1907 (superseding the Convention of 1899) as to the conduct of warfare and as to neutrals.

(iii.) With reference only to war at sea : the Declaration of Paris, of 1856 (to which the United States is now the only important Power which has not become a party), as to privateering,

combination of enemy and neutral property, and blockades; The Hague Conventions of 1907, No. vi. as to enemy merchant vessels at outbreak, No. vii. as to conversion of merchantmen into warships, No. viii. as to mines, No. ix. as to naval bombardments, No. x. as to the sick and wounded, No. xi. as to captures, No. xii. as to an International Prize Court, No. xiii. as to neutrals; the Declaration of London of 1909 as to blockade, contraband, hostile assistance, destruction of prizes, change of flag, enemy character, convoy, resistance and compensation. It must be observed that none of these last-mentioned Hague Conventions have as yet (August, 1909) been ratified, though they have all been signed, by Great Britain. The Declaration of London, purporting to codify on many points the laws of naval warfare, and so to facilitate the working of the proposed International Prize Court, if, and when, this Court shall come into existence, has neither been signed nor ratified by any Power.

Concurrently with the efforts which have thus been made to ascertain the laws of war by general diplomatic agreement, the way for such agreement has been prepared by the labours of the Institut de Droit International, and by the issue by several governments of instructions addressed to their respective armies and navies.

The *Manuel des lois de la guerre sur terre*, published by the Institut in 1880, is the subject of the two letters which immediately follow. Their insertion here, although the part in them of the present writer is but small, may be justified by the fact that they set out a correspondence which is at once interesting and not readily elsewhere accessible. The remaining letters in this chapter relate to the *Naval War Code*, issued by the Government of the United States in 1900, but withdrawn in 1904, though still expressing the views of that Government, for reasons specified in a note to the British *chargé d'affaires* at Washington, and printed in *Parl. Papers, Miscell.* No. 5 (1909), p. 8. The United States, it will be remembered, were also the first Power to attempt a codification of the laws of war on land, in their *Instructions for the Government of Armies of the United States*, issued in 1863, and reissued in 1898. Some information as to this and similar bodies of national instructions may be found in the present writer's *Studies in International*

Law, 1898, p. 85. *Cf.* his *Manual of Naval Prize Law*, issued by authority of the Admiralty in 1888, his *Handbook of the Laws and Customs of War on Land*, issued by authority to the British Army in 1904, and his *The Laws of War on Land (written and unwritten)*, 1908.

COUNT VON MOLTKE ON THE LAWS OF WARFARE

Sir,—You may perhaps think that the accompanying letter, recently addressed by Count von Moltke to Professor Bluntschli, is of sufficient general interest to be inserted in *The Times*. It was written with reference to the Manual of the Laws of War which was adopted by the Institut de Droit International at its recent session at Oxford. The German text of the letter will appear in a few days at Berlin. My translation is made from the proof-sheets of the February number of the *Revue de Droit International*, which will contain also Professor Bluntschli's reply.

Your obedient servant,

T. E. Holland.

Oxford, January 29 (1881).

"Berlin, Dec. 11, 1880.

"You have been so good as to forward to me the manual published by the Institut de Droit International, and you hope for my approval of it. In the first place I fully appreciate the philanthropic effort to soften the evils which result from war. Perpetual peace is a dream, and it is not even a beautiful dream. War is an element in the order of the world ordained by God. In it the noblest virtues of mankind are developed; courage and the abnegation of self, faithfulness to duty, and the spirit of sacrifice: the soldier gives his life. Without war the world would stagnate, and lose itself in materialism.

"I agree entirely with the proposition contained in the introduction that a gradual softening of manners ought to be reflected also in the

mode of making war. But I go further, and think the softening of manners can alone bring about this result, which cannot be attained by a codification of the law of war. Every law presupposes an authority to superintend and direct its execution, and international conventions are supported by no such authority. What neutral States would ever take up arms for the sole reason that, two Powers being at war, the 'laws of war' had been violated by one or both of the belligerents? For offences of that sort there is no earthly judge. Success can come only from the religious moral education of individuals, and from the feeling of honour and sense of justice of commanders who enforce the law and conform to it so far as the exceptional circumstances of war permit.

"This being so, it is necessary to recognise also that increased humanity in the mode of making war has in reality followed upon the gradual softening of manners. Only compare the horrors of the Thirty Years' War with the struggles of modern times.

"A great step has been made in our own day by the establishment of compulsory military service, which introduces the educated classes into armies. The brutal and violent element is, of course, still there, but it is no longer alone, as once it was. Again, Governments have two powerful means of preventing the worst kind of excesses—strict discipline maintained in time of peace, so that the soldier has become habituated to it, and care on the part of the department which provides for the subsistence of troops in the field. If that care fails, discipline can only be imperfectly maintained. It is impossible for the soldier, who endures sufferings, hardships, fatigues, who meets danger, to take only 'in proportion to the resources of the country.' He must take whatever is needful for his existence. We cannot ask him for what is superhuman.

"The greatest kindness in war is to bring it to a speedy conclusion. It should be allowable with that view to employ all methods save those which are absolutely objectionable ('dazu müssen alle nicht geradezu verwerfliche Mittel freistehen'). I can by no means profess agreement with the Declaration of St. Petersburg when it asserts that 'the weakening of the military forces of the enemy' is the only lawful procedure in war. No, you must attack all the resources of the enemy's Government, its finances, its railways, its stores, and even its prestige. Thus energetically, and yet with a moderation previously unknown, was the late war against France conducted. The issue of the campaign was decided in two months, and the fighting did not become embittered till a revolutionary Government, unfortunately for the country, prolonged the war for four more months

"I am glad to see that the manual, in clear and precise articles, pays more attention to the necessities of war than has been paid by previous attempts. But for Governments to recognise these rules will not be enough to insure that they shall be observed. It has long been a universally recognised custom of warfare that a flag of truce must not be fired on, and yet we have seen that rule violated on several occasions during the late war.

"Never will an article learnt by rote persuade soldiers to see a regular enemy (sections 2–4) in the unorganised population which takes up arms, 'spontaneously' (so of its own motion) and puts them in danger of their life at every moment of day and night. Certain requirements of the manual might be impossible of realisation; for instance, the identification of the slain after a great battle. Other requirements would be open to criticism did not the intercalation of such words as 'if circumstances permit,' 'if possible,' 'if it can be done,' 'if necessary,' give them an elasticity but for which the bonds they impose must be broken by inexorable reality.

"I am of opinion that in war, where everything must be individual, the only articles which will prove efficacious are those which are addressed specifically to commanders. Such are the rules of the manual relating to the wounded, the sick, the surgeons, and medical appliances. The general recognition of these principles, and of those also which relate to prisoners, would mark a distinct step of progress towards the goal pursued with so honourable a persistency by the Institut de Droit International.

"Count von Moltke, Field-Marshal-General."

PROFESSOR BLUNTSCHLI'S REPLY TO COUNT VON MOLTKE

Sir,—In accordance with a wish expressed in several quarters, I send you, on the chance of your being able to make room for it, a translation of Professor Bluntschli's reply to the letter from Count von Moltke which appeared in *The Times* of the 1st inst.

Your obedient servant,

T. E. Holland.

Oxford, February (1881).

"Christmas, 1880.

"I am very grateful for your Excellency's detailed and kind statement of opinion as to the manual of the laws of war. This statement invites serious reflections. I see in it a testimony of the highest value, of historical importance; and I shall communicate it forthwith to the members of the Institut de Droit International.

"For the present I do not think that I can better prove my gratitude to your Excellency than by sketching the reasons which have guided our members, and so indicating the nature of the different views which prevail upon the subject.

"It is needless to say that the same facts present themselves in a different light and give a different impression as they are looked at from the military or the legal point of view. The difference is diminished, but not removed, when an illustrious general from his elevated position takes also into consideration the great moral and political duties of States, and when, on the other hand, the representatives of the science of international law set themselves to bring legal principles into relation with military necessities.

"For the man of arms the interest of the safety and success of the army will always take precedence of that of the inoffensive population, while the jurist, convinced that law is the safeguard of all, and especially for the weak against the strong, will ever feel it a duty to secure for private individuals in districts occupied by an enemy the indispensable protection of law. There may be members of the Institut who do not give up the hope that some day, thanks to the progress of civilisation, humanity will succeed in substituting an organised international justice for the wars which now-a-days take place between sovereign States. But the body of the Institut, as a whole, well knows that that hope has no chance of being realised in our time, and limits its action in this matter to two principal objects, the attainment of which is possible:—

"1. To open and facilitate the settlement of trifling disputes between nations by judicial methods, war being unquestionably a method out of all proportion in such cases.

"2. To aid in elucidating and strengthening legal order even in time of war.

"I acknowledge unreservedly that the customs of warfare have improved since the establishment of standing armies, a circumstance which has rendered possible a stricter discipline, and has necessitated a greater care for the provisionment of troops. I also acknowledge unreservedly that the chief credit for this improvement is due to military commanders. Brutal and barbarous pillage was prohibited by generals before jurists were convinced of its illegality. If in our own

day a law recognised by the civilised world forbids, in a general way, the soldier to make booty in warfare on land, we have here a great advance in civilisation, and the jurists have had their share in bringing it about. Since compulsory service has turned standing armies into national armies, war also has become national. Laws of war are consequently more than ever important and necessary, since, in the differences of culture and opinion which prevail between individuals and classes, law is almost the only moral power the force of which is acknowledged by all, and which binds all together under common rules. This pleasing and cheering circumstance is one which constantly meets us in the Institut de Droit International. We see a general legal persuasion ever in process of more and more distinct formation uniting all civilised peoples. Men of nations readily disunited and opposed—Germans and French, English and Russians, Spaniards and Dutchmen, Italians and Austrians—are, as a rule, all of one mind as to the principles of international law.

"This is what makes it possible to proclaim an international law of war, approved by the legal conscience of all civilised peoples; and when a principle is thus generally accepted, it exerts an authority over minds and manners which curbs sensual appetites and triumphs over barbarism. We are well aware of the imperfect means of causing its decrees to be respected and carried out which are at the disposal of the law of nations. We know also that war, which moves nations so deeply, rouses to exceptional activity the good qualities as well as the evil instincts of human nature. It is for this very reason that the jurist is impelled to present the legal principles, of the need for which he is convinced, in a clear and precise form, to the feeling of justice of the masses, and to the legal conscience of those who guide them. He is persuaded that his declaration will find a hearing in the conscience of those whom it principally concerns, and a powerful echo in the public opinion of all countries.

"The duty of seeing that international law is obeyed, and of punishing violations of it, belongs, in the first instance, to States, each within the limits of its own supremacy. The administration of the law of war ought therefore to be intrusted primarily to the State which wields the public power in the place where an offence is committed. No State will lightly, and without unpleasantness and danger, expose itself to a just charge of having neglected its international duties; it will not do so even when it knows that it runs no risk of war on the part of neutral States. Every State, even the most powerful, will gain sensibly in honour with God and man if it is found to be faithful and sincere in respect and obedience to the law of nations.

"Should we be deceiving ourselves if we admitted that a belief in the law of nations, as in a sacred and necessary authority, ought to facilitate the enforcement of discipline in the Army and help to prevent many faults and many harmful excesses? I, for my part, am convinced that the error, which has been handed down to us from antiquity, according to which all law is suspended during war, and everything is allowable against the enemy nation—that this abominable error can but increase the unavoidable sufferings and evils of war without necessity, and without utility from the point of view of that energetic way of making war which I also think is the right way.

"With reference to several rules being stated with the qualifications 'if possible,' 'according to circumstances,' we look on this as a safety-valve, intended to preserve the inflexible rule of law from giving way when men's minds are overheated in a struggle against all sorts of dangers, and so to insure the application of the rules in many other instances. Sad experience teaches us that in every war there are numerous violations of law which must unavoidably remain unpunished, but this will not cause the jurist to abandon the authoritative principle which has been violated. Quite the reverse. If, for instance, a flag of truce has been fired upon, in contravention of the law of nations, the jurist will uphold and proclaim more strongly than ever the rule that a flag of truce is inviolable.

"I trust that your Excellency will receive indulgently this sincere statement of my views, and will regard it as an expression of my gratitude, as well as of my high personal esteem and of my respectful consideration.

"Dr. Bluntschli, Privy Councillor, Professor."

THE UNITED STATES NAVAL WAR CODE

Sir,—The "Naval War Code" of the United States, upon which an interesting article appeared in *The Times* of Friday last, is so well deserving of attention in this country that I may perhaps be allowed to supplement the remarks of your Correspondent from the results of a somewhat minute examination of the code made shortly after its publication.

One notes, in the first place, that the Government of

the United States does not shirk responsibility. It puts the code into the hands of its officers "for the government of all persons attached to the naval service," and is doubtless prepared to stand by the rules contained in it, as being in accordance with international law. These rules deal boldly with even so disagreeable a topic as "Reprisals" (Art. 8), upon which the Brussels, and after it The Hague, Conference preferred to keep silence; and they take a definite line on many questions upon which there are wide differences of opinion. On most debatable points, the rules are in accordance with the views of this country—*e.g.* as to the right of search (Art. 22), as to the two-fold list of contraband (Arts. 34–36), as to the moment at which the liability of a blockade-runner commences (Art. 44), and as to the capture of private property (Art. 14), although the prohibition of such capture has long been favoured by the Executive of the United States, and was advocated by the American delegates at The Hague Conference. So also Arts. 34–36, by apparently taking for granted the correctness of the rulings of the Supreme Court in the Civil War cases of the *Springbok* and the *Peterhoff* with reference to what may be described as "continuous carriage," are in harmony with the views which Lord Salisbury recently had occasion to express as to the trade of the *Bundesrath* and other German vessels with Lorenzo Marques. It must be observed, on the other hand, that Art. 30 flatly contradicts the British rule as to convoy; while Art. 3 sets out The Hague Declaration as to projectiles dropped from balloons, to which this country is not a party. Art. 7 departs from received views by prohibiting altogether the use of false colours, and Art. 14 (doubtless in pursuance of the recent decision of the Supreme

Court in the *Paquete Habana*), by affirming the absolute immunity of coast fishing vessels, as such, from capture.

On novel questions the code is equally ready with a solution. It speaks with no uncertain voice on the treatment of mail steamers and mail-bags (Art. 20). On cable-cutting it adopts in Art. 5, as your Correspondent points out, the views which I ventured to maintain in your columns when the question was raised during the war of 1898. I may also, by the way, claim the support of the code for the view taken by me, in a correspondence also carried on in your columns during the naval manœuvres of 1888, of the bombardment of open coast towns. Art. 4 sets out substantially the rules upon this subject for which I secured the *imprimatur* of the Institut de Droit International in 1896.

Secondly, the code is so well brought up to date as to incorporate (Arts. 21–29) the substance of The Hague Convention, ratified only in September last, for applying to maritime warfare the principles of the Convention of Geneva. Art. 10 of The Hague Convention has been reproduced in the code, in forgetfulness perhaps of the fact that that article has not been ratified.

Thirdly, the code contains, very properly, some general provisions applicable equally to warfare upon land (Arts. 1, 3, 8, 12, 54).

Fourthly, it is clearly expressed ; and it is brief, consisting of only 54 articles, occupying 22 pages.

Fifthly, it deals with two very distinct topics—*viz.* the mode of conducting hostilities against the forces of the enemy, and the principles applicable to the making prize of merchant vessels, which as often as not may be the

property of neutrals. These topics are by no means kept apart as they might be, articles on prize occurring unexpectedly in the section avowedly devoted to hostilities.

It is worth considering whether something resembling the United States code would not be found useful in the British Navy. Our code might be better arranged than its predecessor, and would differ from it on certain questions, but should resemble it in clearness of expression, in brevity, and, above all things, in frank acceptance of responsibility. What naval men most want is definite guidance, in categorical language, upon those points of maritime international law upon which their Government has made up its own mind.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, April 8 (1901).

A NAVAL WAR CODE

Sir,—It is now nearly a year ago since I ventured to suggest in your columns (for April 10, 1901) that something resembling the United States "Naval War Code," dealing with "the laws and usages of war at sea," would be found useful in the British Navy.

The matter is, however, not quite so simple as might be inferred from some of the allusions to it which occurred during last night's debate upon the Navy Estimates. Upon several disputable and delicate questions the Government of the United States has not hesitated to express definite views; and they are not always views which the Government of our own country would be prepared to endorse. For some remarks upon these questions in detail, and upon

the code generally, I must refer to my former letter, but may perhaps be allowed to quote its concluding words, which were to the following effect :—

"Our code might be better arranged than its predecessor, and would differ from it on certain questions, but should resemble it in clearness of expression, in brevity, and, above all things, in frank acceptance of responsibility. What naval men most want is definite guidance, in categorical language, upon those points of maritime international law upon which their Government has made up its own mind."

Before issuing such a code our authorities would have to decide—first, what are the classes of topics as to which it is desirable to give definite instructions to naval officers ; and, secondly, with reference to topics, to be included in the instructions, as to which there exist international differences of view, what is, in each case, the view by which the British Government is prepared to stand.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, March 12 (1902).

CHAPTER III

THE COMMENCEMENT OF WAR

Section 1

Declaration of War

The following letter bears upon the question, much discussed in recent years, of the lawfulness of hostilities commenced without anything amounting to a declaration of war. Although several modern wars, *e.g.* the Franco-Prussian of 1870, and the Russo-Turkish of 1877, were preceded by declaration, it was hardly possible, in view of the practice of the last two centuries, to maintain that this was required by international law, and it has never been alleged that any definite interval need intervene between a declaration and the first act of hostilities. On the destruction of the *Kowshing*, the present writer may further refer to his *Studies in International Law*, 1898, p. 126, and to Professor Takahashi's *International Law during the Chino-Japanese War*, 1899, pp. 24, 192.

THE SINKING OF THE *KOWSHING*

Sir,—The words of soberness and truth were spoken with reference to the sinking of the *Kowshing* in the letter from Professor Westlake which you printed on Friday last. Ignorance dies hard, or, after the appearance of that letter and of your remarks upon it, one might have expected that leading articles would be less lavishly garnished with such phrases as "act of piracy," "war without declaration," "insult to the British flag," "condign punishment of the Japanese commander." But these flowers of speech continue to blossom; and, now that the facts of the case seem to be established beyond reasonable doubt by the telegrams of this morning, I should be glad to be allowed to state shortly what I believe will be the verdict of international law upon what has occurred.

If the visiting, and eventual sinking, of the *Kowshing* occurred in time of peace, or in time of war before she had notice that war had broken out, a gross outrage has taken place. But the facts are otherwise.

In the first place, a state of war existed. It is trite knowledge, and has been over and over affirmed by Courts, both English and American, that a war may legally commence with a hostile act on one side, not preceded by declaration. How frequently this has occurred in practice may be seen from a glance at an historical statement prepared for the War Office by Colonel Maurice *à propos* of the objections to a Channel tunnel. Whether or no hostilities had previously occurred upon the mainland, I hold that the acts of the Japanese commander in boarding the *Kowshing*

and threatening her with violence in case of disobedience to his orders were acts of war.

In the second place, the *Kowshing* had notice of the existence of a war, at any rate from the moment when she received the orders of the Japanese commander.

The *Kowshing*, therefore, before the first torpedo was fired, was, and knew that she was, a neutral ship engaged in the transport service of a belligerent. (Her flying the British flag, whether as a *ruse de guerre* or otherwise, is wholly immaterial.) Her liabilities, as such ship, were two-fold :—

1. Regarded as an isolated vessel, she was liable to be stopped, visited, and taken in for adjudication by a Japanese Prize Court. If, as was the fact, it was practically impossible for a Japanese prize crew to be placed on board of her, the Japanese commander was within his rights in using any amount of force necessary to compel her to obey his orders.

2. As one of a fleet of transports and men-of-war engaged in carrying reinforcements to the Chinese troops on the mainland, the *Kowshing* was clearly part of a hostile expedition, or one which might be treated as hostile, which the Japanese were entitled, by the use of all needful force, to prevent from reaching its destination.

The force employed seems not to have been in excess of what might lawfully be used, either for the arrest of an enemy's neutral transport or for barring the progress of a hostile expedition. The rescued officers also having been set at liberty in due course, I am unable to see that any violation of the rights of neutrals has occurred. No apology is due to our Government, nor have the owners of the

Kowshing, or the relatives of any of her European officers who may have been lost, any claim for compensation. I have said nothing about the violation by the Japanese of the usages of civilised warfare (not of the Geneva Convention, which has no bearing upon the question), which would be involved by their having fired upon the Chinese troops in the water; not only because the evidence upon this point is as yet insufficient, but also because the grievance, if established, would affect only the rights of the belligerents, *inter se;* not the rights of neutrals, with which alone this letter is concerned. I have also confined my observations to the legal aspects of the question, leaving to others to test the conduct of the Japanese commander by the rules of chivalrous dealing or of humanity.

Your obedient servant,

T. E. Holland.

Athenæum Club, August 6 (1894).

The controversy caused by the sinking of the *Kowshing* in 1894 was revived by the manner of the Japanese attack upon Port Arthur in 1904 (see Professor Takahashi's *International Law applied to the Russo-Japanese War*, 1908, p. 1), and led to a careful study of the subject by a committee of the Institut de Droit International, resulting in the adoption by the Institut, at its Ghent meeting in 1906, of the following resolutions :—

(1) "It is in conformity with the requirements of International law, to the loyalty which the nations owe one to another in their mutual relations, as well as to the general interests of all States, that hostilities ought not to commence without previous and unequivocal warning.

(2) "This warning may be given either in the shape of a declaration of war pure and simple, or in the shape of an ultimatum duly notified to the adversary by the State which wishes to begin the war.

(3) "Hostilities must not commence until after the expiration

of a delay which would suffice to prevent the rule as to a previous and unequivocal warning from being thought to be evaded." See the *Annuaire de l'Institut*, t. xxi. p. 292.

In accordance with the principles underlying the first and second of these resolutions, The Hague Convention, No. iii. of 1907, has now laid down as a principle of International law, binding upon the contracting Powers, that—

(1) " Hostilities between them ought not to commence without a warning previously given and unequivocal, in the form either of a reasoned declaration of war, or of an ultimatum, with a conditional declaration of war."

And the Convention goes on to provide that—

(2) " The state of war ought to be notified without delay to neutral Powers, and shall be of no effect with reference to them, until after a notification, which may be made even telegraphically. Nevertheless, neutral Powers may not plead absence of notification, if it has been shown beyond question that they were in fact cognisant of the state of war." Any reference to the need of an interval between declaration and the first act of hostility (such as is contained in the third of the resolutions of the Institut) was deliberately omitted from the Convention, although a declaration immediately followed by an attack would obviously be of little service to the party attacked. (See the present writer's *Laws of War on Land (written and unwritten)*, 1908, p. 18.)

Section 2

The Immediate Effects of the Outbreak of War

Before any actual hostilities have taken place, each belligerent acquires, *ipso facto*, certain new rights over persons and property belonging to the other, which happen to be at the time within its power, *e.g.* the right, much softened in modern practice, and specifically dealt with in The Hague Convention, No. vi. of 1907, of capturing enemy merchant vessels so situated.

The following letter deals with the permissible treatment of enemy persons so situated; and was suggested by a question asked in the House of Commons on February 25, 1909, by Mr. Arnold-Forster: *viz.* " What would be the *status* of officers

and men of the Regular Army of a hostile belligerent Power, found within the limits of the United Kingdom after an act of declaration of war; and would such persons be liable to be treated as prisoners of war, or would they be despatched under the protection of the Government to join the forces of the enemy?" The general effect of the Attorney-General's reply may be gathered from the quotations from it made in the letter.

The topic was again touched upon on March 3, in a question put by Captain Faber, to which Mr. Haldane replied.

FOREIGN SOLDIERS IN ENGLAND

Sir,—The question raised last night by Mr. Arnold-Forster is one which calls for more careful consideration than it appears yet to have received. International law has in modern times spoken with no very certain voice as to the permissible treatment of alien enemies found within the territory of a belligerent at the outbreak of war.

There is, however, little doubt that such persons, although now more usually allowed to remain, during good behaviour, may be expelled, and, if necessary, wholesale, as were Germans from France in 1870. But may such persons be, for good reasons, arrested, or otherwise prevented from leaving the country, as Germans were prevented from leaving France in the earlier days of the Franco-Prussian War? Grotius speaks with approval of such a step being taken, "ad minuendas hostium vires." Bynkershoek, more than a century later, recognises the right of thus acting, "though it is rarely exercised." So the Supreme Court of the United States in "Brown *v.* United States" (1814). So Chancellor Kent (1826), and Mr. Manning (1839) is explicit that the arrest in question is lawful, and that "the individuals are prisoners of war."

Vattel, it is true (1758), ventures to lay down that—

"Le Souverain qui déclare la guerre ne peut retenir les sujets de l'ennemi qui se trouvent dans ses états au moment de la déclaration . . . en leur permettant d'entrer dans ses terres et d'y séjourner, il leur a promis tacitement toute liberté et toute sûreté pour le retour."

And he has been followed by some recent writers. There is, however, I venture to hold, no ground for asserting that this indulgent system is imposed by international law. I am glad, therefore, to find the Attorney-General laying down that—

"for strictly military reasons, any nation is entitled to detain and to intern soldiers found upon the territory at the outbreak of war."

And I should be surprised if, under all circumstances, as the learned Attorney-General seems to think probable—

"England would follow, whatever the strict law may be, the humane and chivalrous practice of modern times, and would give to any subjects of a hostile Power who might be found here engaging in civilian pursuits a reasonable time within which to leave for their own country, even although they were under the obligation of entering for service under the enemy's flag."

The doctrine of Vattel has, in fact, become less plausible than it was before universal liability to military service had become the rule in most Continental countries. The peaceably engaged foreign resident is now in all probability a trained soldier, and liable to be recalled to the flag of a possible enemy.

There may, of course, be considerable practical difficulties in the way of ascertaining the nationality of any given foreigner, and whether he has completed, or evaded, the military training required by the laws of his country. It may also be a question of high policy whether resident enemies would not be a greater danger to this country if

they were compelled to remain here, than if they were allowed, or compelled, to depart, possibly to return as invaders.

I am only concerned to maintain that, as far as international law is concerned, England has a free hand either to expel resident enemies or to prevent them from leaving the country, as may seem most conducive to her own safety.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, February 25 (1909).

CHAPTER IV

THE CONDUCT OF WARFARE AS BETWEEN BELLIGERENTS

Section 1

Localities closed to Hostilities

Besides neutral territory and waters generally, certain localities are more specifically closed to operations of war. The following letters deal with the Convention of October 29, 1888, with reference to the Suez Canal. Their object was to obviate some misconceptions as to the purport of the Convention, and to maintain that it was not, at the time of writing, operative, so far as Great Britain was concerned. This state of things was altered by the Anglo-French Convention of April 8, 1904, which, concerned principally with the settlement of the Egyptian and Newfoundland questions, provides, in Article 6, that " In order to assure the free passage of the Suez Canal, the Government of His Britannic Majesty declares that it adheres to the stipulations of the Treaty concluded on the 29th October, 1888, and to their becoming operative. The free passage of the canal being thus

guaranteed, the execution of the last phrase of paragraph 1, and that of paragraph 2 of the 8th article of this Treaty will remain suspended."

The last phrase of paragraph 1 is : " The Canal shall never be subjected to the exercise of the right of blockade."

Paragraph 2 of the Article 8 relates to the presidency of a special commissioner of the Ottoman Government over meetings of the agents of the signatory Powers.

On the whole question see *Parl. Papers, Egypt*, No. 1 (1888), *Commercial*, No. 2 (1889), and the present writer's *Studies in International Law*, p. 270.

THE SUEZ CANAL

Sir,—Your correspondent "M.B." has done good service by calling attention to the misleading nature of the often-repeated statement that the Suez Canal has been "neutralised" by the Convention of 1888. Perhaps you will allow me more explicitly to show why, and how far, this statement is misleading.

In the first place, this Convention is inoperative. It is so in consequence of the following reservation made by Lord Salisbury in the course of the negotiations which resulted in the signature of the Convention :—

"Les Délégués de la Grande-Bretagne . . . pensent qu'il est de leur devoir de formuler une réserve générale quant à l'application de ces dispositions en tant qu'elles ne seraient pas compatibles avec l'état transitoire et exceptionel où se trouve actuellement l'Egypte, et qu'elles pourraient entraver la liberté d'action de leur Gouvernement pendant la période de l'occupation de l'Egypte par les forces de sa Majesté Britannique."

Being thus unaffected by the treaty, the canal retains those characteristics which it possesses, under the common law of nations, as a narrow strait, wholly within the territory of one Power and connecting two open seas. The fact that

the strait is artificial may, I think, be dismissed from consideration, for reasons stated by me in the *Fortnightly Review* for July, 1883. The characteristics of such a strait are unfortunately by no means well ascertained, but may perhaps be summarised as follows. In time of peace, the territorial Power is bound by modern usage to allow "innocent passage," under reasonable conditions as to tolls and the like, not only to the merchant vessels, but also, probably, to the ships of war, of all nations. In time of war, the territorial Power, if belligerent, may of course carry on, and is exposed to, hostilities in the strait as elsewhere, and the entrances to the strait are liable to a blockade. Should the territorial Power be neutral, the strait would be closed to hostilities, though it would probably be open to the "innocent passage" of belligerent ships of war.

It may be worth while to enquire how far this state of things would be affected by the Convention of 1888, were it to come into operation. The *status* of the canal in time of peace would be substantially untouched, save by the prohibition to the territorial Power to fortify its banks. Even with reference to time of war, several of the articles of the Convention merely reaffirm well-understood rules applicable to all neutral waters—*e.g.* that no hostilities may take place therein. The innovations proposed by the Convention are mainly contained, as "M.B." points out, in the first article, which deals with the position of the canal when the territorial Power is belligerent. In such a case, subject to certain exceptions, with a view to the defence of the country, the ships of that Power are neither to attack nor to be attacked in the canal, or within three miles of its ports of access, nor are the entrances of the canal to be

blockaded. This is "neutralisation" only in a limited and vague sense of the term, the employment of which was indeed carefully avoided not only in the Convention itself but also in the diplomatic discussions which preceded it.

I am, Sir, your obedient servant,

T. E. Holland.

Brighton, October 4 (1898).

THE SUEZ CANAL

Sir,—Your correspondent, "M.B." if he will allow me to say so, supports this morning a good case by a bad argument, which ought hardly to pass without remark.

It is impossible to accept his suggestion that the article which he quotes from the Treaty of Paris can be taken as containing "an international official definition of neutralisation as applied to waters." The article in question, after declaring the Black Sea to be "neutralisée," no doubt goes on to explain the sense in which this phrase is to be understood, by laying down that the waters and ports of that sea are perpetually closed to the ships of war of all nations. It is, however, well known that such a state of things as is described in the latter part of the article is so far from being involved in the definition of "neutralisation" as not even to be an ordinary accompaniment of that process. Belgium is unquestionably "neutralised," but no one supposes that the appearance in its waters and ports of ships of war is therefore prohibited. The fact is that the term "neutralisée" was employed in the Treaty of Paris as a

euphemism, intended to make less unpalatable to Russia a restriction upon her sovereign rights which she took the earliest opportunity of repudiating.

I am, Sir, your obedient servant,

T. E. Holland.

Brighton, October 6 (1898).

THE SUEZ CANAL

Sir,—Will you allow me to reply in the fewest possible words to the questions very courteously addressed to me by Mr. Gibson Bowles in his letter which appeared in *The Times* of yesterday?

1. It is certainly my opinion, for what it is worth, that the full operation of the Convention of 1888 is suspended by the reserves first made on behalf of this country during the sittings of the Conference of 1885. These reserves were textually repeated by Lord Salisbury in his despatch of October 21, 1887, enclosing the draft convention which, three days later, was signed at Paris by the representatives of France and Great Britain, the two Powers which, with the assent of the rest, had been carrying on the resumed negotiations with reference to the canal. Lord Salisbury's language was also carefully brought to the notice of each of the other Powers concerned, in the course of the somewhat protracted discussions which preceded the final signature of the same convention at Constantinople on October 29, 1888.

2. All the signatories of the convention having thus become parties to it after express notice of "the conditions under which her Majesty's Government have expressed

their willingness to agree to it," must, it can hardly be doubted, share the view that the convention is operative only *sub modo*.

3. Supposing the convention to have become operative, and supposing the territorial Power to be neutral in a war between States which we may call A and B, the convention would certainly entitle A to claim unmolested passage for its ships of war on their way to attack the forces of B in the Eastern seas.

4. The language of the convention, being as it is the expression of a compromise involving much re-drafting, is by no means always as clear as it might be. But when Mr. Gibson Bowles is again within reach of Blue-books he will probably agree with me that the treaty need not, as he suggests, be "read as obliging the territorial Power, even when itself a belligerent, to allow its enemy to use the canal freely for the passage of that enemy's men-of-war." The wide language of Article 1 (which is substantially in accordance with Mr. Gibson Bowles's reminiscence of it) must be read in connection with Article 10, and without forgetting that, in discussing the effect of an attack upon the canal by one of the parties to the convention, Lord Salisbury wrote in 1887, "on the whole, it appears to be the sounder view that, in such a case, the treaty, being broken by one of its signatories, would lose its force in all respects."

Your obedient servant,

T. E. Holland.

Oxford, October 9 (1898).

SECTION 2

Lawful Belligerents

GUERILLA WARFARE

SIR,—When Mr. Balfour last night quoted certain articles of the "Instructions for the Government of Armies of the United States in the Field" with reference to guerilla warfare, some observations were made, and questions put, upon which you will perhaps allow me to say a word or two.

1. Mr. Healy seemed to think that something turned upon the date (May, 1898) at which these articles were promulgated. In point of fact they were a mere reissue of articles drawn by the well-known jurist Francis Lieber, and, after revision by a military board, issued in April, 1863, by President Lincoln.

2. To Mr. Morley's enquiry, "Have we no rules of our own?" the answer must be in the negative. The traditional policy of our War Office has been to "trust to the good sense of the British officer." This policy, though surprisingly justified by results, is so opposed to modern practice and opinion that, as far back as 1878–80, I endeavoured, without success, to induce the Office to issue to the Army some authoritative, though simple, body of instructions such as have been issued on the Continent of Europe and in America. The War Office was, however, content to include in its "Manual of Military Law," published in 1883, a chapter which is avowedly unauthoritative, and expressly stated to contain only "the opinions of the compiler, as drawn from the authorities cited."

3. The answer to Sir William Harcourt's unanswered

question, "Were there no rules settled at The Hague?" must be as follows. The Hague Convention of 1899, upon "the laws and customs of warfare," ratified by this country on September 4 last, binds the contracting parties to give to their respective armies instructions in conformity with the *Règlement* annexed to the Convention. This *Règlement*, which is substantially a reproduction of the unratified *projet* of the Brussels Conference of 1874, does deal, in Articles 1–3, with guerilla warfare. It is no doubt highly desirable that, as soon as may be, the drafting of rules in accordance with the *Règlement* should be seriously taken in hand, our Government having now abandoned its *non possumus* attitude in the matter. It will, however, be found to be the case, as was pointed out by Mr. Balfour, that the sharp distinction between combatants and non-combatants contemplated by the ordinary laws of war is inapplicable (without the exercise of undue severity) to operations such as those now being carried out in South Africa.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, December 7 (1900).

"Lieber's Instructions," issued in 1863 and reissued in 1898, will doubtless be superseded, or modified, in consequence of the United States having, on April 9, 1902, ratified the Convention of 1899, and on March 10, 1908, that of 1907, as to the Laws and Customs of War on Land.

The answer to Mr. Morley's enquiry in 1900 would not now be in the negative. The present writer's representations resulted in Mr. Brodrick, when Secretary for War, commissioning him to prepare a Handbook of the *Laws and Customs of War on Land*, which was issued to the Army by authority in 1904. On the instructions issued by other National Governments, see the author's *Laws of War on Land*, 1908, pp. 71–73.

The answer, given in the letter, to Sir William Harcourt's

question must now be supplemented by a reference to the Handbook, above mentioned as having contained rules founded upon the *Règlement* annexed to the Convention of 1899, and by a statement that that Convention, with its *Règlement*, is now superseded by Conventions No. iv. (with its *Règlement*) and No. v. of 1907.

Article 1, as to what is required from a lawful belligerent (set out in the following letter), and Art. 2, granting some indulgence to "the population of a territory which has not been occupied who, on the approach of the enemy, spontaneously take up arms to resist the invading troops, without having had time to organise themselves in accordance with Art. 1," are identical in the *Règlements* of 1899 and 1907. *Cf. supra*, p. 22.

THE RUSSIAN USE OF CHINESE CLOTHING

Sir,—If Russian troops have actually attacked while disguised in Chinese costume, they have certainly violated the laws of war. It may, however, be worth while to point out that the case is not covered, as might be inferred from the telegram forwarded to you from Tokio on Wednesday last, by the text of Article 23 (*f*) of the *Règlement* annexed to The Hague Convention "on the laws and customs of war on land." This article merely prohibits "making improper use of a flag of truce, of the national flag or the military distinguishing marks and the uniform of the enemy, as well as of the distinguishing signs of the Geneva Convention."

Article 1 of the *Règlement* is more nearly in point, insisting, as it does, that even bodies not belonging to the regular army, which, it is assumed, would be in uniform (except in the case of a hasty rising to resist invasion), shall, in order to be treated as "lawful belligerents," satisfy the following requirements, *viz.* :—

"(1) That of being commanded by a person responsible for his subordinates;

"(2) That of having a distinctive mark, recognisable at a distance

"(3) That of carrying their arms openly; and

"(4) That of conducting their operations in accordance with the laws and customs of war."

The fact that, under special circumstances, as in the Boer war, marks in the nature of uniform have not been insisted upon, has, of course, no bearing upon the complaint now made by the Japanese Government.

All signatories of The Hague Convention are bound to issue to their troops instructions in conformity with the *Règlement* annexed to it. The only countries which, so far as I am aware, have as yet fulfilled their obligations in this respect are Italy, which has circulated the French text of the *Règlement* without comment; Russia, which has prepared a little pamphlet of sixteen pages for the use of its armies in the Far East; and Great Britain, which has issued a Handbook, containing explanatory and supplementary matter, besides the text of the relevant diplomatic Acts.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, October 21 (1904).

Section 3

Assassination

The following letter will sufficiently explain the circumstance to which it relates. Lord Elgin, Secretary of State for the Colonies, on April 30, 1906, informed a deputation that the offer of £500 for Bambaata had been withdrawn by the Natal Government, and a statement to the same effect was made on May 2, by Mr Churchill, in the House of Commons.

Article 23 (*b*) of the Regulations of 1899, cited as confirmatory of the condemnation of anything resembling assassination, is reproduced in the Regulations as re-drafted in 1907. *Cf.* Lieber's *Instructions*, Art. 148.

THE NATAL PROCLAMATION

Sir,—It was reported a few days ago that the Natal Government had offered a reward for Bambaata, dead or alive. I have waited for a statement that no offer of the kind had been made, or that it had been made by some over-zealous official, whose act had been disavowed. No such statement has appeared. On the contrary, we read that "the price placed upon the rebel's head has excited native cupidity." It may therefore be desirable to point out that what is alleged to have been done is opposed to the customs of warfare, whether against foreign enemies or rebels.

By Article 23 (*b*) of The Hague Regulations "it is especially prohibited to kill or wound treacherously individuals belonging to the hostile nation or army"; words which, one cannot doubt, would include not only assassination of individuals, but also, by implication, any offer for an individual "dead or alive." The Regulations are, of course, technically binding only between signatories of the convention to which they are appended; but Article 23 (*b*) is merely an express enactment of a well-established rule of the law of nations. A recent instance of its application occurred, before the date of The Hague Convention, during operations in the neighbourhood of Suakin. An offer by the British Admiral of a reward for Osman Digna, dead or alive, was, if I mistake not, promptly cancelled and disavowed by the home Government.

I am, Sir, your obedient servant,

T. E. Holland.

Brighton, April 17 (1906).

SECTION 4

The Choice of Means of Injuring

BULLETS IN SAVAGE WARFARE

SIR,—The Somaliland debate was sufficient evidence that The Hague Convention "respecting the laws and customs of war on land" is far more talked about than read. Colonel Cobbe had, it appears, complained of the defective stopping power, as against the foes whom he was encountering, of the Lee-Metford bullet. It is the old story that wounds inflicted by this bullet cannot be relied on to check the onrush of a hardy and fanatical savage, though they may ultimately result in his death. Whereupon arises, on the one hand, the demand for a more effective projectile, and, on the other hand, the cry that the proposed substitute is condemned by "the universal consent of Christendom"; or, in particular, "by the Convention of The Hague," which as was correctly stated by Mr. Lee, prohibits only the use of arms which cause superfluous injury.

You print to-day two letters enforcing the view of the inefficiency against savages of the ordinary service bullet. Perhaps you will find space for a few words upon the question whether the employment for this purpose of a severer form of projectile, such as the Dum Dum bullet, would be a contravention of the "laws of war."

The law of the subject, as embodied in general international agreements, is to be found in four paragraphs; to which, be it observed, nothing is added by the unwritten, or customary, law of nations. Of these paragraphs, which I shall set out textually, three affirm general principles,

while the fourth contains a specific prohibition. The general provisions are as follows :—

"The progress of civilisation should have the effect of alleviating as much as possible the calamities of war. The only legitimate object which States should set before themselves during war is to weaken the military forces of the enemy. For this purpose it is sufficient to disable the greatest possible number of men. This object would be exceeded by the employment of arms which would uselessly aggravate the sufferings of disabled men or render their death inevitable. The employment of such arms would, therefore, be contrary to the laws of humanity." (St. Petersburg Declaration, 1868. Preamble.)

"The right of belligerents to adopt means of injuring the enemy is not unlimited." (Hague *Règlement*, Art. 22.)

"Besides the prohibitions provided by special conventions [the Declaration of St. Petersburg alone answers to this description] it is in particular prohibited (*e*) to employ arms, projectiles, or material of a nature to cause superfluous injury." (*Ib.* Art. 23.)

The only special prohibition is that contained in the Declaration of St. Petersburg, by which the contracting parties—

"Engage mutually to renounce, in case of war among themselves, the employment by their military or naval forces of any projectile of a weight below 400 grammes which is either explosive or charged with fulminating or inflammable substances."

No one, so far as I am aware, has any wish to employ a bullet weighing less than 14 oz. which is either explosive or charged as above. So far, therefore, as the generally accepted laws of warfare are concerned, the only question as to the employment of Dum Dum or other expanding bullets is whether they "uselessly aggravate the sufferings of disabled men, or render their death inevitable"; in other words, whether they are "of a nature to cause superfluous injury." It is, however, probable that people who glibly talk of such bullets being "prohibited by The Hague Convention" are hazily reminiscent, not of the *Règlement* appended to that convention, but of a certain "Declaration,"

signed by the delegates of many of the Powers represented at The Hague in 1899, to the effect that—

"The contracting Powers renounce the use of bullets which expand or flatten easily in the human body, such as bullets with a hard casing, which does not entirely cover the core, or is pierced with incisions."

To this declaration neither Great Britain nor the United States are parties, and it is waste-paper, except for Powers on whose behalf it has not only been signed, but has also been subsequently ratified.

I am, Sir, your obedient servant,

T. E. Holland.

Athenæum Club, May 2 (1903).

The provisions of Articles 22 and 23 (*e*) of the *Règlement* annexed to The Hague Convention of 1899 "concerning the Laws and Customs of War on Land," as quoted in the letter, have been textually reproduced in Arts. 22 and 23 (*e*) of the *Règlement* annexed to The Hague Convention, No. iv. of 1907 on the same subject.

Under the "special conventions" mentioned in Art. 23 of the *Règlement* must still be included the Declaration of St. Petersburg of 1868, to which must now be added at least two of the declarations signed at The Hague in 1899, *viz.* the second, relating to the spreading of harmful gases, and the third, relating to expanding bullets, both of which were signed in 1907 by Great Britain and the United States, which had previously stood aloof from them (see the last paragraph of the letter). The importance and number of the Powers which declined in 1907 to join in renewing the first of the Declarations of 1899, relating to projectiles from balloons, as to which, see the next letter, must prevent its renewal by many other Powers from having any practical effect.

The written law as to the choice of weapons may be taken therefore to start from the general principles laid down in the preamble to the Declaration of St. Petersburg (though held by some Powers to err in the direction of liberality), and in Arts. 22 and 23 (*e*) of The Hague *Règlement*. The specially prohibited means of destruction are, by the Declaration of St. Petersburg,

explosive bullets; by The Hague Declarations of 1899, "projectiles the sole object of which is the diffusion of asphyxiating or harmful gases," and "bullets which expand or flatten easily in the human body, such as bullets with a hard casing, which does not entirely cover the core, or is pierced with incisions"; by The Hague *Règlement*, Art. 23 (*a*), poison or poisoned arms.

It must be remarked that the Declarations of St. Petersburg and of The Hague, unlike The Hague *Règlement*, apply to war at sea, as well as on land. *Cf. supra*, p. 22, and see the author's *The Laws of War on Land* (*written and unwritten*), 1908, pp. 40–43.

THE DEBATE ON AERONAUTICS

Sir,—It is not to be wondered at that the Chairman of Committees declined to allow yesterday's debate on aviation to diverge into an enquiry whether the Powers could be induced to prohibit, or limit, the dropping of high explosives from aerial machines in war time. The question is, however, one of great interest, and it may be desirable, with a view to future discussions, to state precisely, since little seems to be generally known upon the subject, what has already been attempted in this direction.

In the *Règlement* annexed to The Hague Convention of 1899, as to the "Laws and Customs of War on Land," Article 23, which specifically prohibits certain "means of injuring the enemy," makes no mention of aerial methods; but Article 25, which prohibits "the bombardment of towns, villages, habitations, or buildings, which are not defended," was strengthened, when the *Règlement* was reissued in 1907 as an annexe to the, as yet not generally ratified, Hague Convention No. IV of that year, by the insertion, after the word "bombardment," of the words, "by any means whatever," with the expressed intention of including in the prohibition the throwing of projectiles from balloons.

The Hague Convention No. IX of 1907, also not yet generally ratified, purports to close a long controversy, in accordance with the view which you allowed me to advocate, with reference to the naval manœuvres of 1888, by prohibiting the "naval bombardment of ports, towns, villages, habitations, or buildings, which are not defended." The words "by any means whatever" have not been here inserted, one would incline to think by inadvertence, having regard to what passed in Committee, and to the recital of the Convention, which sets out the propriety of extending to naval bombardments the principles of the *Règlement* (cited, perhaps again by inadvertence, as that of 1899) as to the Laws and Customs of War on Land.

But the topic was first squarely dealt with by the first of the three Hague Declarations of 1899, by which the Powers agreed to prohibit, for five years, "the throwing of projectiles and explosives from balloons, or by other analogous new methods." The Declaration was signed and ratified by almost all the Powers concerned; not, however, by Great Britain.

At The Hague Conference of 1907, when the Belgian delegates proposed that this Declaration, which had expired by efflux of time, should be renewed, some curious changes of opinion were found to have occurred. Twenty-nine Powers, of which Great Britain was one, voted for renewal, but eight Powers, including Germany, Spain, France, and Russia, were opposed to it, while seven Powers, one of which was Japan, abstained from voting. The Japanese delegation had previously intimated that, "in view of the absence of unanimity on the part of the great military Powers, there seemed to be no great use in binding their

country as against certain Powers, while, as against the rest, it would still be necessary to study and bring to perfection this mode of making war." Although the Declaration, as renewed, was allowed to figure in the "Acte final" of the Conference of 1907, the dissent from it of several Powers of the first importance must render its ratification by the others highly improbable; nor would it seem worth while to renew, for some time to come, a proposal which, only two years ago, was so ill received.

I may perhaps add, with reference to what was said by one of yesterday's speakers, that any provision on the topic under discussion would be quite out of place in the Geneva Convention, which deals, not with permissible means of inflicting injury, but exclusively with the treatment of those who are suffering from injuries inflicted.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, August 3 (1909).

Section 5

The Geneva Convention

As far back as the year 1870, the Society for the Prevention of Cruelty to Animals exerted itself to induce both sides in the great war then commencing to make some special provision for relieving, or terminating, the sufferings of horses wounded in battle.

In 1899 it made the same suggestion to the British War Office, but the reply of the Secretary of State was to the effect that "he is informed that soldiers always shoot badly wounded horses after, or during, a battle, whenever they are given time to do so, *i.e.* whenever the operation does not involve risk to human life. He fears that no more than this can be done unless and until some international convention extends to those who care for

wounded animals the same protection for which the Geneva Convention provides in the case of men; and he would suggest that you should turn your efforts in that direction."

Thereupon, Mr. Lawrence L. Pike, on November 23, addressed to *The Times* the letter which called forth the letter which follows.

WOUNDED HORSES IN WAR

Sir,—Every one must sympathise with the anxiety felt by Mr. L. W. Pike to diminish the sufferings of horses upon the field of battle. How far any systematic alleviation of such sufferings may be compatible with the exigencies of warfare must be left to the decision of military experts. In the meantime it may be as well to assure Mr. Pike that the Geneva Convention of 1864 has nothing to do with the question, relating, as it does, exclusively to the relief of human suffering. This is equally the case with the second Geneva Convention, which Mr. Pike is right in supposing never to have been ratified. He is also right in supposing that "the terms of the convention are capable of amendment from time to time," but wrong in supposing that they can be amended "by the setting up of precedents." The convention can be amended only by a new convention.

It is not the case that Article 7 of the convention, which merely confides to commanders-in-chief, under the instructions of their respective Governments, "les détails d'exécution de la présente convention," gives them any authority to extend its scope beyond what is expressly stated to be its object—*viz.* "l'amélioration du sort des militaires blessés dans les armées en campagne." While, however, the Geneva Convention does not contemplate the relief of animal suffering, it certainly cannot be "set up as a bar" to the provision of such relief. Commanders who may

see their way to neutralising persons engaged in the succour or slaughter of wounded horses would be quite within their powers in entering into temporary agreements for that purpose.

I may add that the "Convention concerning the laws and customs of war on land," prepared by the recent conference at The Hague, and signed on behalf of most Governments, including our own, though not yet ratified, contains a chapter "Des malades et des blessés," which merely states that the obligations of belligerents on this point are governed by the Convention of Geneva of 1864, with such modifications as may be made in it. Among the aspirations (*vœux*), recorded in the "Acte final" of the conference, is one to the effect that steps may be taken for the assembling of a special conference, having for its object the revision of the Geneva Convention. Should such a conference be assembled Mr. Pike will have an opportunity of addressing it upon the painfully interesting subject which he has brought forward in your columns.

Your obedient servant,

T. E. Holland.

Oxford, November 27 (1899).

The "second Geneva Convention," above mentioned, was the "Projet d'Articles additionnels," signed on October 20, 1868, but never ratified.

Art. 21 of the *Règlement* annexed to The Hague Convention of 1899 as to the "Laws and Customs of War on Land," stating that "the obligations of belligerents, with reference to the care of the sick and wounded, are governed by the Convention of Geneva of August 22, 1864, subject to alterations which may be made in it," is now represented by Art. 21 of The Hague *Règlement* of 1907, which mentions "the Convention of Geneva," without mention of any date, or of possible alterations.

The Geneva Convention intended in this later *Règlement* is, of course, that of 1906, for the numerous Powers which have already ratified it, since for them it has superseded that of 1864. The later is somewhat wider in scope than the earlier convention, its recital referring to "the sick," as well as to the wounded, and its first article naming not only "les militaires," but also "les autres personnes officiellement attachées aux armées."

With a view to the expected meeting of the Conference by which the Convention was signed in 1906, Mr. Pike and his friends' in 1903, pressed upon the British Government their desire that the new convention should extend protection to persons engaged in relieving the sufferings of wounded horses. The British delegates to the Conference, however, who had already been appointed, and were holding meetings in preparation for it, were not prepared to advise the insertion of provisions for this purpose in the revised Convention of Geneva.

Section 6

Enemy Property in Occupied Territory

By Art. 55 of The Hague *Règlement* of 1899, which reproduces Art. 7 of the Brussels *Projet*, and is repeated as Art. 55 of the *Règlement* of 1907: "The occupying State shall regard itself as being only administrator and usufructuary of the public buildings, immoveable property, forests and agricultural undertakings belonging to the hostile State and situated in the hostile country. It must protect the substance of these properties and administer them according to the rules of usufruct."

The following letter touches incidentally upon the description of the rights of an invader over certain kinds of State property in the occupied territory as being those of a "usufructuary."

INTERNATIONAL "USUFRUCT"

Sir,—The terminology of the law of nations has been enriched by a new phrase. We are all getting accustomed to "spheres of influence." We have been meditating for

some time past upon the interpretation to be put upon "a lease of sovereign rights." But what is an international "usufruct"? The word has, of course, a perfectly ascertained sense in Roman law and its derivatives; but it has been hitherto employed, during perhaps two thousand years, always as a term of private law—*i.e.* as descriptive of a right enjoyed by one private individual or corporation over the property of another. It is the "ius utendi fruendi, salva rerum substantia." The usufructuary of land not merely has the use of it, but may cut its forests and work its mines, so long as he does not destroy the character of the place as he received it. His interest terminates with his life, though it might also be granted to him for a shorter period. If the grantee be a corporation, in order to protect the outstanding right of the owner an artificial limit is imposed upon the tenure—*e.g.* in Roman law 100 years, by the French Code 30 years. For details it may suffice to refer to the Institutes of Justinian, II. 4; the Digest, VII. 1; the Code Civil, sects. 573–636; the new German Civil Code, sects. 1030–1089.

It remains to be seen how the conception of "usufruct" is to be imported into the relations of sovereign States, and, more especially, what are to be the relations of the usufructuary to States other than the State under which he holds. It is, of course, quite possible to adapt the terms of Roman private law to international use. "Dominium," "Possessio," "Occupatio," have long been so adapted, but it has yet to be proved that "Ususfructus" is equally malleable. I can recall no other use of the term in international discussions than the somewhat rhetorical statement that an invader should consider himself as merely the "usufructuary" of the resources

of the country which he is invading; which is no more than to say that he should use them "en bon père de famille." It will be a very different matter to put a strict legal construction upon the grant of the "usufruct" of Port Arthur. By way of homage to the conception of such a grant, as presumably creating at the outside a life-interest, Russia seems to have taken it, in the first instance, only for 25 years. One may, however, be pardoned for sharing, with reference to this transaction, the scruples which were felt at Rome as to allowing the grant of a usufruct to a corporation—"periculum enim esse videbatur, ne perpetuus fieret."

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, March 30 (1898).

P.S.—It would seem from M. Lehr's *Éléments du droit civil Russe* that "usufruct" is almost unknown to the law of Russia, though a restricted form of it figures in the code of the Baltic provinces.

It is certain that, apart from general conventions, international law imposes no liability on an invader to pay for requisitioned property or services, or to honour any receipts which he may have given for them.

The Hague Convention of 1899 made no change in this respect. Articles 51 and 52 of the *Règlement* annexed to the Convention direct, it is true, that receipts should be given for contributions ("un reçu sera délivré aux contribuables") and for supplies not paid for ("elles seront constatées par des reçus"), but these receipts were to be merely evidence that money or goods have been taken, and it was left an open question, by whom, if at all, compensation was to be made for the losses thus established.

The *Règlement* of 1907 is more liberal than that of 1899 with

reference to requisitioned property (though not with reference to contributions). By the new Art. 52, "supplies furnished in kind shall be paid for, so far as possible, on the spot. If not, they shall be vouched for (*constatées*) by receipts, and payment of the sums due shall be made as soon as may be." The Hague Convention mentioned in the following letter is, of course, that of 1899.

REQUISITIONS IN WARFARE

Sir,—A few words of explanation may not be out of place with reference to a topic touched upon last night in the House of Commons—*viz.* the liability of the British Government to pay for stock requisitioned during the late war from private enemy owners. It should be clearly understood that no such liability is imposed by international law. The commander of invading forces may, for valid reasons of his own, pay cash for any property which he takes, and, if he does not do so, is nowadays expected to give receipts for it. These receipts are, however, not in the nature of evidence of a contract to pay for the goods. They are intended merely to *constater* the fact that the goods have been requisitioned, with a view to any indemnity which may eventually be granted to the sufferers by their own Government. What steps should be taken by a Government towards indemnifying enemies who have subsequently become its subjects, as is now happily the case in South Africa, is a question not of international law, but of grace and favour.

An article in the current number of the *Review of Reviews*, to which my attention has just been called, contains some extraordinary statements upon the topic under discussion. The uninformed public is assured that "we owe the Boers payment in full for all the devastation which we have inflicted

upon their private property . . . it is our plain legal obligation, from the point of view of international law, to pay it to the last farthing." Then The Hague Convention is invoked as permitting interference with private property "only on condition that it is paid for in cash by the conqueror, and, if that is not possible at the moment, he must in every case give a receipt, which he must discharge at the conclusion of hostilities." There is no such provision as to honouring receipts in this much misquoted convention.

Your obedient servant,

T. E. Holland.

Oxford, July 30 (1902).

Section 7

Martial Law

The first of the letters which follow has reference to the case of two Boer prisoners who, having taken the oath of neutrality on the British occupation of Pretoria, attempted to escape from the town, both being armed, and one of them having fired upon and wounded a sentinel who called upon them to stop. They were tried by court martial, condemned to death, and shot on June 11, 1901. The Hague Convention quoted in the letter is that of 1899, but the same Art. 8 figures in the Convention of 1907.

The second and third of these letters relate to a question of English public law, growing out of the exercise of martial law in British territory in time of war. One Marais, accused of having contravened the martial law regulations of May 1, 1901, was imprisoned in Cape Colony by military authority, and the Supreme Court at the Cape held that it had no authority to order his release. The Privy Council refused an application for leave to appeal against this decision, saying that "no doubt has ever existed that, when war actually prevails, the ordinary

courts have no jurisdiction over the action of the military authorities"; adding that "the framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure" *Ex parte* D. F. Marais, [1902] A.C. 109. Thereupon arose a discussion as to the extent of the prohibition of the exercise of martial law contained in the Petition of Right; and Mr. Edward Jenks, in letters to *The Times* of December 27, 1901, and January 4, 1902, maintained that the prohibition in question was not confined to time of peace.

The last letter deals with the true character of a Proclamation of Martial Law, and was suggested by the refusal of the Privy Council, on April 2, 1906, to grant leave to appeal from sentences passed in Natal by court martial, in respect of acts committed on February 8, 1906, whereby retrospective effect had, it was alleged, been given to a proclamation not issued till the day after the acts were committed. See Mcomini Mzinelwe and Wanda *v.* H. E. the Governor and the A. G. for the Colony of Natal, 22 *Times Law Reports*, 413.

THE EXECUTIONS AT PRETORIA

Sir,—No doubt is possible that by international law, as probably by every system of national law, all necessary means, including shooting, may be employed to prevent the escape of a prisoner of war. The question raised by the recent occurrence at Pretoria is, however, a different one—*viz.* What are the circumstances in connection with an attempt to escape which justify execution after trial by court-martial of the persons concerned in it? This question may well be dealt with apart from the facts, as to which we are as yet imperfectly informed, which have called for Mr. Winston Churchill's letter. With the arguments of that letter I in the main agree, but should not attach so much importance as Mr. Churchill appears to do to a chapter of the British *Manual of Military Law*, which, though included

in a Government publication, cannot be taken as official, since it is expressly stated "to have no official authority" and to "express only the opinions of the compiler, as drawn from the authorities cited."

I propose, without comment, to call attention to what may be found upon this subject in Conventional International Law, in one or two representative national codes, and in the considered judgment of the leading contemporary international lawyers.

I. The Hague "Convention on the laws and customs of war on land" (ratified by twenty Powers) lays down :—

"ARTICLE VIII.—Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State into whose hands they have fallen. Any act of insubordination warrants the adoption as regards them of such measures of severity as may be necessary. Escaped prisoners, recaptured before they have succeeded in rejoining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment. Prisoners who after succeeding in escaping are again taken prisoners are not liable to any punishment for their previous flight."

The Hague Conference, in adopting this article, adopted also, as an "authentic interpretation" of it, a statement that the indulgence granted to escapes does not apply to such as are accompanied by "special circumstances," of which the instances given are "complot, rébellion, émeute."

"ARTICLE XII.—Any prisoner of war who is liberated on parole and recaptured bearing arms against the Government to which he had pledged his honour, or against the allies of that Government, forfeits his right to be treated as a prisoner of war, and can be put on his trial."

II. By the United States Instructions :—

"ARTICLE 77.—A prisoner of war may be shot or otherwise killed in his flight; but neither death nor any other punishment shall be inflicted on him simply for his attempt. . . . If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished even with death, &c."

"ARTICLE 78.—If prisoners of war, having given no pledge, nor made any promise on their honour, forcibly, or otherwise, escape, and are captured again in battle, after having rejoined their own army, they shall not be punished for their escape.

"ARTICLE 124.—Breaking the parole is punished with death when the person breaking the parole is captured again."

Cf. the French *Code de Justice Militaire*, Article 204, and other Continental codes to the same effect.

III. The *Manuel des Lois de la guerre sur terre* of the Institute of International Law lays down :—

"ARTICLE 68.—Si le fugitif ressaisi ou capturé de nouveau avait donné sa parole de ne pas s'évader, il peut être privé des droits de prisonnier de guerre.

"ARTICLE 78.—Tout prisonnier libéré sur parole et repris portant les armes contre le gouvernement auquel il l'avait donnée, peut être privé des droits de prisonnier de guerre, à moins que, postérieurement à sa libération, il n'ait été compris dans un cartel d'échange sans conditions."

I am, Sir, your obedient servant,

T. E. HOLLAND.

Oxford, June 17 (1901).

THE PETITION OF RIGHT

SIR,—This is, I think, not a convenient time, nor perhaps are your columns the place, for an exhaustive discussion of the interpretation and application of the Petition of Right. It may, however, be just worth while to make the following remarks, for the comfort of any who may have been disquieted by the letter addressed to you by my friend Mr. Jenks :—

1. Although, as is common knowledge, the words "in time of peace," so familiar in the Mutiny Acts from the reign of Queen Anne onwards, do not occur in the Petition, they do occur, over and over again, in the arguments used in the

House of Commons by "the framers of the Petition of Right," to employ the phraseology of the judgment recently delivered in the Privy Council by the Lord Chancellor.

2. The prohibition contained in the Petition, so far from being "absolute and unqualified," is perfectly specific. It refers expressly to "Commissions of like nature" with certain Commissions lately issued :—

"By which certain persons have been assigned and appointed Commissioners, with power and authority to proceed within the land, according to the justice of martial law, against such soldiers or mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martial law, and is used in armies in time of war, &c."

The text of these Commissions, the revocation of which is demanded by the Petition, is still extant.

3. The Petition neither affirms nor denies the legality of martial law in time of war; although its advocates were agreed that at such a time martial law would be applicable to soldiers.

4. A war carried on at a distance from the English shores, as was the war with France in 1628, did not produce such a state of things as was described by the advocates of the Petition as "a time of war." "We have now no army in the field, and it is no time of war," said Mason in the course of the debates. "If the Chancery and Courts of Westminster be shut up, it is time of war, but if the Courts be open, it is otherwise; yet, if war be in any part of the Kingdom, that the Sheriff cannot execute the King's writ, there is *tempus belli*," said Rolls.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, December 31 (1901).

THE PETITION OF RIGHT

Sir,—In a letter which you allowed me to address to you a few days ago, I dealt with two perfectly distinct topics.

In the first place I pointed out that the words occurring in a recent judgment of the Privy Council, which were cited by Mr. Jenks as a clear example of an assumption "that the Petition of Right, in prohibiting the exercise of martial law, restricted its prohibition to time of peace," imply, as I read them, no assumption as to the meaning of that document, but merely contain an accurate statement of fact as to the line of argument followed by the supporters of the Petition in the House of Commons. Can Mr. Jenks really suppose that in making this remark I was "appealing from the 'text of the Petition' to the debates in Parliament"?

I then proceeded to deal very shortly with the Petition itself, showing that while it neither condemns nor approves of the application of martial law in time of war (see Lord Blackburn's observations in R. *v.* Eyre) the prohibition contained in its martial law clauses, so far from being "absolute and unqualified," relates exclusively to "commissions of like nature" with certain commissions which had been lately issued (at a time which admittedly, for the purposes of this discussion, was not "a time of war"), the text of which is still preserved, and the character of which is set forth in the Petition itself, as having authorised proceedings within the land, "according to the justice of martial law, against such soldiers or mariners," as also against "such other dissolute persons joining with them," &c. The description of these commissions, be it observed, is not merely introduced

into the Petition by way of recital, but is incorporated by express reference into the enacting clause.

Thus much and no more I thought it desirable to say upon these two topics by way of dissent from a letter of Mr. Jenks upon the subject. In a second letter Mr. Jenks rides off into fresh country. I do not propose to follow him into the history of the conferences which took place in May, 1628, after the framing of the Petition of Right, except to remark that what passed at these conferences is irrelevant to the interpretation to be placed upon the Petition, and, if relevant, would be opposed to Mr. Jenks's contention. It is well known that the Lords pressed the Commons to introduce various amendments into the Petition and to add to it the famous reservation of the "sovereign power" of the King. One of the proposed amendments referred, as Mr. Jenks says, to martial law, forbidding its application to "any but soldiers and mariners," or "in time of peace, or when your Majesty's Army is not on foot." The Commons' objection to this seems to have been that it was both unnecessary and obscurely expressed. "Their complaint is against commissions in time of peace." "It may be a time of peace, and yet his Majesty's Army may be on foot, and that martial law was not lawful here in England in time of peace, when the Chancery and other Courts do sit." "They feared that this addition might extend martial law to the trained bands, for the uncertainty thereof." The objections of the Commons were, however, directed not so much to the amendments in detail as to any tampering with the text of the Petition. "They would not alter any part of the Petition" (nor did they, except by expunging two words alleged to be needlessly offensive), still less would they consent to add to it

the reservation as to the "sovereign power" of the King.

The story of these abortive conferences, however interesting historically, appears to me to have no bearing upon the legality of martial law, and I have no intention of returning to the subject.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, January 8 (1902).

MARTIAL LAW IN NATAL

Sir,—It seems that in the application made yesterday to the Judicial Committee of the Privy Council, on behalf of Natal natives under sentence of death, much stress was laid upon the argument that a proclamation of martial law cannot have a retrospective application. You will, perhaps, therefore allow me to remind your readers that, so far from the date of the proclamation having any bearing upon the merits of this painful case, the issue of any proclamation of martial law, in a self-governing British colony, neither increases nor diminishes the powers of the military or other authorities to take such steps as they may think proper for the safety of the country. If those steps were properly taken they are covered by the common law; if they have exceeded the necessities of the case they can be covered only by an Act of Indemnity. The proclamation is issued merely, from abundant caution, as a useful warning to those whom it may concern.

This view, I venture to think, cannot now be seriously controverted; and I am glad to find, on turning to Mr.

Clode's *Military and Martial Law*, that the passage cited in support of Mr. Jellicoe's contention as to a proclamation having no retroactive application is merely to the effect that this is so if certain statements, made many years ago in a debate upon the subject, are correct. As to their correctness, or otherwise, Mr. Clode expresses no opinion.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, April 3 (1906).

Section 8

The Naval Bombardment of Open Coast Towns

The four letters which first follow were suggested by the British Naval Manœuvres of 1888, during which operations were supposed to be carried on, by the squadron playing the part of a hostile fleet, which I ventured to assert to be in contravention of international law. Many letters were written by naval men in a contrary sense, and the report of a committee of admirals appointed to consider, among other questions, "the feasibility and expediency of cruisers making raids on an enemy's coasts and unprotected towns for the purpose of levying contributions," was to the effect that "there can be no doubt about the feasibility of such operations by a maritime enemy possessed of sufficient power; and as to the expediency, there can be as little doubt but that any Power at war with Great Britain will adopt every possible means of weakening her enemy; and we know of no means more efficacious for making an enemy feel the pinch of war than by thus destroying his property and touching his pocket." (*Parl. Paper*, 1889 [c. 5632], pp. 4, 8.) The hostile squadron had, it seems, received express instructions "to attack any port in Great Britain." (See more fully in the writer's *Studies in International Law*, 1898, p. 96.) The fifth letter was suggested by a Russian protest against alleged Japanese action in 1904.

The subsequent history of this controversy, some account of

which is subjoined to these letters, has, it is submitted, established the correctness of the views maintained in them.

NAVAL ATROCITIES

Sir,—I trust we may soon learn on authority whether or no the enemies of this country are conducting naval hostilities in accordance with the rules of civilised warfare. I read with indignation that the *Spider* has destroyed Greenock; that she announced her intention of "blowing down" Ardrossan; that she has been "shelling the fine marine residences and watering-places in the Vale of Clyde." Can this be true, and was there really any ground for expecting that "a bombardment of the outside coast of the Isle of Wight" would take place last night?

Your obedient servant,

T. E. Holland.

Athenæum Club, August 7 (1888).

THE NAVAL MANŒUVRES

Sir,—In a letter which I addressed to you on the 7th inst. I ventured to point out the discrepancy between the proceedings of certain vessels belonging to Admiral Tryon's fleet and the rules of civilised warfare. Your correspondent on board Her Majesty's ship *Ajax* yesterday told us something of the opinion of the fleet as to the bombardment and ransoming of defenceless seaboard towns, going on to predict that, in a war in which England should be engaged, privateers would again be as plentiful as in the days of Paul Jones, and assuring us that in such a war "not the slightest respect would be paid to old-fashioned treaties, protocols, or other diplomatic documents." Captain

James appears, from his letter which you print to-day, to be of the same opinion as the fleet, with reference both to bombardments and to privateers; telling us also in plain language that "the talk about international law is all nonsense."

Two questions are thus raised which seem worthy of serious consideration. First, what are the rules of international law with reference to the bombardment of open towns from the sea (I leave out of consideration the better understood topic of privateering)? Secondly, are future wars likely to be conducted without regard to international law?

1. I need hardly say that I do not, as Captain James supposes, contend "that unfortified towns will never be bombarded or ransomed." International law has never prohibited, though it has attempted to restrict, the bombardment of such towns. Even in 1694 our Government defended the destruction of Dieppe, Havre, and Calais only as a measure of retaliation, and in subsequent naval wars operations of this kind have been more and more carefully limited, till in the Crimean war our cruisers were careful to abstain from doing further damage than was involved in the confiscation or destruction of stores of arms and provisions. The principles involved were carefully considered by the military delegates of all the States of Europe at the Brussels Conference of 1874, and their conclusions, which apply, I conceive, *mutatis mutandis*, to operations conducted by naval forces against places on land, are as follows:—

"Article 15.—Fortified places are alone liable to be besieged. Towns, agglomerations of houses, or villages which are open or undefended cannot be attacked or bombarded."

"ARTICLE 16.—But if a town, &c., be defended, the commander of the attacking forces should, before commencing a bombardment, and except in the case of surprise, do all in his power to warn the authorities."

"ARTICLE 40.—As private property should be respected, the enemy will demand from parishes or the inhabitants only such payments and services as are connected with the necessities of war generally acknowledged, in proportion to the resources of the country."

"ARTICLE 41.—The enemy in levying contributions, whether as equivalents for taxes or for payments which should be made in kind, or as fines, will proceed, as far as possible, according to the rules of the distribution and assessment of the taxes in force in the occupied territory. Contributions can be imposed only on the order and on the responsibility of the general in chief."

"ARTICLE 42.—Requisitions shall be made only by the authority of the commandant of the locality occupied."

These conclusions are substantially followed in the chapter on the "Customs of War" contained in the *Manual of Military Law* issued for the use of officers by the British War Office.

The bombardment of an unfortified town would, I conceive, be lawful—(1) as a punishment for disloyal conduct; (2) in extreme cases, as retaliation for disloyal conduct elsewhere; (3) for the purpose of quelling armed resistance (not as a punishment for resistance when quelled); (4) in case of refusal of reasonable supplies requisitioned, or of a reasonable money contribution in lieu of supplies. It would, I conceive, be unlawful—(1) for the purpose of enforcing a fancy contribution or ransom, such as we were told was exacted from Liverpool; (2) by way of wanton injury to private property, such as was supposed to have been caused in the Clyde and at Folkestone, and *à fortiori* such as would have resulted from the anticipated shelling during the night-time of the south coast of the Isle of Wight.

2. Is it the case that international law is "all nonsense," and that "when we are at war with an enemy he will do his best to injure us? He will do so in what way he thinks proper, all treaties and all so-called international law notwithstanding"? Are we, with Admiral Aube, to speak of "cette monstrueuse association de mots: les droits de la guerre"? If so, *cadit quæstio*, and a vast amount of labour has been wasted during the last three centuries. I can only say that such a view of the future is not in accordance with the teachings of the past. The body of accepted usage, supplemented by special conventions, which is known as international law, has, as a matter of fact, exercised, even in time of war, a restraining influence on national conduct. This assertion might be illustrated from the discussions which have arisen during recent wars with reference to the Geneva Convention as to the treatment of the wounded and the St. Petersburg declaration against the use of explosive bullets. The binding obligation of these instruments, which would doubtless be classed by your correspondent with the fleet among "old-fashioned treaties, protocols, and other diplomatic documents," has never been doubted, while each party has eagerly endeavoured to disprove alleged infractions of them.

The naval manœuvres have doubtless taught many lessons of practical seamanship. They will have done good service of another sort if they have brought to the attention of responsible statesmen such questions as those with which I have attempted to deal. It is essential that the country should know the precise extent of the risks to which our seaboard towns will be exposed in time of war,

and it is desirable that our naval forces should be warned against any course of action in their conduct of mimic warfare which could be cited against us, in case we should ever have to complain of similar action on the part of a real enemy.

Your obedient servant,

T. E. Holland.

Oxford, August 18 (1888).

THE NAVAL MANŒUVRES

Sir,—In my first letter I called attention to certain operations of the *Spider* and her consorts which seemed to be inspired by no principle beyond that of doing unlimited mischief to the enemy's seaboard. In a second letter I endeavoured to distinguish between the mischief which would and that which would not be regarded as permissible in civilised warfare. The correspondence which has subsequently appeared in your columns has made sufficiently clear the opposition between the view which seems to find favour just now in naval circles and the principles of international law as I have attempted to define them. The question between my critics and myself is, in effect, whether the mediæval or the modern view as to the treatment of private property is to prevail. According to the former, all such property is liable to be seized or destroyed, in default of a "Brandschatz," or ransom. According to the latter, it is inviolable, subject only to certain well-defined exceptions, among which reasonable requisitions of supplies would be recognised, while demands of money contributions, as such, would not be recognised.

The evidence in favour of the modern view being what

I have stated it to be is, indeed, overwhelming; but I should like to call special attention to the *Manuel de Droit International à l'Usage des Officiers de l'Armée de Terre*, issued by the French Government, as going even further than the Brussels Conference in the restrictions which it imposes upon the levying of requisitions and contributions. The Duke of Wellington, who used to be thought an authority in these matters, wrote in 1844, with reference to a pamphlet in which the Prince de Joinville had advocated depredations on the English coasts :—

"What but the inordinate desire of popularity could have induced a man in his station to write and publish an invitation and provocation to war, to be carried on in a manner such as has been disclaimed by the civilised portions of mankind ? "

The naval historian, Mr. Younge, in commenting on the burning of Paita, in Chili, as far back as 1871, for non-compliance with a demand for a money contribution (ultimately reduced to a requisition of provisions for the ships), speaks of it as "worthy only of the most lawless pirate or buccaneer, . . . as a singular proof of how completely the principles of civilised warfare were conceived to be confined to Europe."

Such exceptional acts as the burning of Paita, or the bombardment of Valparaiso, mentioned by Mr. Herries, will, of course, occur from time to time. My position is that they are so far stigmatised as barbarous by public opinion that their perpetration in civilised warfare may be regarded as improbable ; in other words, that they are forbidden by international law.

It is a further question whether the rules of international law on this point are to be changed or disregarded in future.

Do we expect and are we desirous that future wars shall be conducted in accordance with buccaneering precedent, or with what has hitherto been the general practice of the nineteenth century? Your naval correspondents incline to revert to buccaneering, and thus to the introduction into naval coast operations of a rigour long unknown to the operations of military forces on land; but they do so with a difference. Lord Charles Beresford (writing early in the controversy) asserts the permissibility of ransoming and destroying, without any qualifying expressions; while Admiral de Horsey would apparently only ask "rich" towns for contributions, insisting also that a contribution must be "reasonable," and expressly repudiating any claim to do "wanton injury to property of poor communities, and still less to individuals." In the light of these concessions, I venture to claim Admiral de Horsey's concurrence in my condemnation of most of the doings mentioned in my first letter, although on the whole he ranges himself on the side of the advocates of what I maintain to be a change in the existing law of war. Whether or no the existing law needs revision is a question for politicians and for military and naval experts. It is within my province only to express a hope that the contradiction between existing law and new military necessities (if, indeed, such contradiction exists) will not be solved by a repudiation of all law as "nonsense"; and, further, that if a change of law is to be effected, it will be done with due deliberation and under a sense of responsibility. It should be remembered that operations conducted with the apparent approval of the highest naval authorities, and letters in *The Times* from distinguished admirals, are in truth the stuff that public opinion, and in

particular that department of public opinion known as "international law," is made of.

The ignorance, by the by, which certain of my critics have displayed of the nature and claims of international law is not a little surprising. Some seem to identify it with treaties; others with "Vattel." Several, having become aware that it is not law of the kind which is enforced by a policeman or a County Court bailiff, have hastened, much exhilarated, to give the world the benefit of their discovery. Most of them are under the impression that it has been concocted by "bookworms," "jurists," "professors," or other "theorists," instead of, as is the fact, mainly by statesmen, diplomatists, prize courts, generals, and admirals. This is, however, a wide field, into which I must not stray. I have even avoided the pleasant by-paths of disquisition on contraband, privateering, and the Declaration of Paris generally, into which some of your correspondents have courteously invited me. I fear we are as yet far from having disposed of the comparatively simple question as to the operations which may be properly undertaken by a naval squadron against an undefended seaboard.

I am, your obedient servant,

T. E. Holland.

Llanfairfechan, August 27 (1888).

NAVAL BOMBARDMENTS OF UNFORTIFIED PLACES

Sir,—The protest reported to have been lodged by the Russian Government against the bombardment by the Japanese fleet of a quarantine station on the island of

San-shan-tao, apart from questions of fact, as to which we have as yet no reliable information, recalls attention to a question of international law of no slight importance—*viz.* under what, if any, circumstances it is permissible for a naval force to bombard an "open" coast town.

In the first place, it may be hardly necessary to point out the irrelevancy of the reference, alleged to have been made in the Russian Note to "Article 25 of The Hague Convention." The Convention and the *Règlement* annexed to it are, of course, exclusively applicable to "la guerre sur terre." Not only, however, would any mention of a naval bombardment have been out of place in that *Règlement*, but a proposal to bring such action within the scope of its 25th Article, which prohibits "the attack or bombardment of towns, villages, habitations, or buildings which are not defended," was expressly negatived by the Conference of The Hague. It became abundantly clear, during the discussion of this proposal, that the only chance of an agreement being arrived at was that any allusion to maritime warfare should be carefully avoided. It was further ultimately admitted, even by the advocates of the proposal, that the considerations applicable to bombardments by an army and by a naval force respectively are not identical. It was, for instance, urged that an army has means other than those which may alone be available to a fleet for obtaining from an open town absolutely needful supplies. The Hague Conference, therefore, left the matter where it found it, recording, however, among its "pious wishes" (*vœux*) one to the effect "that the proposal to regulate the question of the bombardment of ports, towns, and villages by a

naval force should be referred for examination to a future conference."

The topic is not a new one. You, Sir, allowed me to raise it in your columns with reference to the naval manœuvres of 1888, when a controversy ensued which disclosed the existence of a considerable amount of naval opinion in favour of practices which I ventured to think in contravention of international law. It was also thoroughly debated in 1896 at the Venice meeting of the Institut de Droit International upon a report drafted by myself, as chairman of a committee appointed a year previously. This report lays down that the restrictions placed by international law upon bombardments on land apply also to those effected from the sea, except that such operations are lawful for a naval force when undertaken with a view to (1) obtaining supplies of which it is in need ; (2) destroying munitions of war or warships which may be in a port ; (3) punishing, by way of reprisal, violations by the enemy of the laws of war. Bombardments for the purpose of exacting a ransom or of putting pressure upon the hostile Power by injury to peaceful individuals or their property were to be unlawful. The views of the committee were, in substance, adopted by the Institut, with the omission only of the paragraph allowing bombardment by way of reprisals.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, April 2 (1904).

The "Hague Conference" and "Hague Convention" to which reference was made in the last of these letters were, of course, those of 1899.

For the action taken by the Institut de Droit International in 1895 and 1896, on the initiative of the present writer, see the *Annuaire de l'Institut*, tt. xiv. p. 295, xv. pp. 145, 309, and his *Studies in International Law*, p. 106. See also, at p. 104 of the same work, an opinion given by him as to the liability to bombardment of The Hague.

The later history of the topic has been in accordance with the views maintained by the writer of these letters, and with the *Rapport* drafted by him for the Institut. The Hague Conference of 1899, though unable to discuss it, registered a *vœu* "that the proposal to regulate the question of the bombardment of ports, towns and villages by a naval force may be referred for examination to a future Conference." See *Parl. Paper, Miscell.* No. 1 (1889), pp. 139, 146, 162, 165, 258, 283. At the Conference of 1907 a Convention, No. ix., was accordingly signed, Art. 1 of which prohibits "the bombardment by naval forces of ports, towns, villages, houses, or buildings which are not defended." Several Powers dissented from the concluding words of this article which explain that a place is not to be considered to be defended, merely because it is protected by submarine contact-mines. Bombardment is, however, permitted, by Art. 2, of places which are, in fact, military or naval bases, and, by Arts. 3 and 4, of places which refuse to comply with reasonable requisitions for food needed by the fleet, though not for refusal of money contributions.

The *Acte Final* of the Conference further registers a *vœu* that "the Powers should, in all cases, apply, as far as possible, to war at sea the principles of the Convention concerning the laws and customs of war on land." (*Parl. Paper, Miscell.* No. 1 (1908), p. 30.) Convention, No. iv. of 1907, in Art. 25 of the *Règlement* annexed to it, lays down that "the attack or bombardment, by whatsoever means, of towns, villages, habitations, or buildings which are not defended, is prohibited."

The British Government had, in 1907, so far departed from the Admiralty views of 1888, as to instruct their delegates that "the Government consider that the objection, on humanitarian grounds, to the bombardment of unfortified towns is too strong to justify a resort to that measure, even though it may be permissible under the abstract doctrines of international law [?]. They wish it, however, to be clearly understood that any general

prohibition of such practice must not be held to apply to such operations as the bombardment of towns or places used as bases or storehouses of naval or military equipment or supply, or ports containing fighting ships, and that the landing of troops, or anything partaking of the character of a military or naval operation, is also not covered." (*Ib.* p. 14.)

CHAPTER V

THE RIGHTS AND DUTIES OF NEUTRALS

Section 1

The Criterion of Neutral Conduct

The main object of the following letter was to assert, as against any possible misunderstanding of phraseology attributed to a great international lawyer (since lost to science and to his friends by his sudden death on June 20, 1909), the authority by which alone neutral rights and duties are defined.

The letter also touches upon the limit of time which a neutral Power is bound to place upon the stay in its ports of belligerent ships of war ; a topic more fully discussed in the next section.

PROFESSOR DE MARTENS ON THE SITUATION

Sir,—The name of my distinguished friend, M. de Martens, carries so much weight that I hope you will allow me at once to say that I am convinced that to-day's

telegraphic report of some communication made by him to the St. Petersburg newspapers fails to convey an accurate account of the views which he has thus expressed.

On matters of fact it would appear that he is no better informed than are most of us in this country; and under matters of fact may be included the breaches of neutrality which he is represented as counter-charging against the Japanese. It is exclusively with the views on questions of law which are attributed to Professor de Martens that I am now concerned. He is unquestionably right in saying, as I pointed out in a recent letter, that the hard and fast rule, fixing 24 hours as the limit, under ordinary circumstances, of the stay of a belligerent warship in neutral waters is not yet universally accepted as a rule of international law; and, in particular, is not adopted by France.

But what of the further *dictum* attributed to Professor de Martens, to the effect that "each country is its own judge as regards the discharge of its duties as a neutral"? This statement would be a superfluous truism if it meant merely that each country, when neutral, must, in the first instance, decide for itself what courses of action are demanded from it under the circumstances. The words may, however, be read as meaning that the decision of the neutral country, as to the propriety of its conduct, is final, and not to be questioned by other Powers. An assertion to this effect would obviously be the negation of the whole system of international law, of which Professor de Martens is so great a master, resting, as that system does, not on individual caprice, but upon the agreement of nations in restraint of the caprice of any one of them. The last word, with reference to the propriety of the conduct of any given State, rests,

of course, not with that State, but with its neighbours. "Securus iudicat orbis terrarum." Any Power which fails in the discharge, to the best of its ability, of a generally recognised duty, is likely to find that self-satisfaction is no safeguard against unpleasant consequences. Professor de Martens would, I am certain, endorse this statement.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, May 12 (1905).

Section 2

The Duties of Neutral States, and the Liabilities of Neutral Individuals, distinguished

The duties of neutral States have been classified by the present writer under the heads of "Abstention," "Prevention," and "Acquiescence" (*Transactions of the British Academy*, vol. ii. p. 55). In the five letters which follow, an attempt is made to point out the confusion which has resulted from failure to distinguish between the two last-mentioned heads of neutral duty; on the one hand, namely, the cases in which a neutral government is bound itself to come forward and take steps to prevent certain classes of action on the part of belligerents, or of its own subjects, *e.g.* the over-stay in its ports of belligerent fleets, or the export from its shores of ships of war for belligerent use; and, on the other hand, the cases in which the neutral government is bound only to passively acquiesce in interference by belligerents with the commerce of such of its subjects as may choose, at their own risk and peril, to engage in carriage of contraband, breach of blockade, and the like.

I. A neutral State is bound to prevent its territory from becoming, in any way, a "base of operations" for either belligerent. Of the various obligations thus arising, the following letters deal

with the duty of the State (1) to prevent the departure from its ports of vessels carrying coal intended to supply directly the needs of a belligerent fleet; and (2) to prevent the reception accorded in its ports to belligerent warships from being such as will unduly facilitate their subsequent operations. It is pointed out that the rule adopted by the United States and this country, as well as by some others, when neutral, by which the stay of belligerent warships is limited to twenty-four hours, has not been adopted by the nations of the European continent. The attempt made at The Hague Conference of 1907 to secure the general acceptance of this rule was unsuccessful; and Convention No. x. of that year, which deals with this subject, merely lays down, in Art. 12, that "*In the absence of special provisions to the contrary in the legislation of a neutral Power*, belligerent warships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by this Convention." Art. 27 obliges the contracting Powers to "communicate to each other in due course all laws, proclamations, and other enactments, regulating in their respective countries the *status* of belligerent warships in their ports and waters."

II. A neutral State is *not* bound to prevent such assistance being rendered by its subjects to either belligerent as is involved in *e.g.* blockade-running or carriage of contraband; but merely to acquiesce in the loss and inconvenience which may in consequence be inflicted by the belligerents upon persons so acting. In order to explain this statement, it became necessary to say much as to the true character of "carriage of contraband" (although this topic is more specifically dealt with in the letters contained in Section 3), and to point out that such carriage is neither a breach of international law nor forbidden by the law of England. For the same reason, it seemed desirable to criticise some of the clauses now usually inserted in British Proclamations of Neutrality.

The view here maintained commended itself to the Institut de Droit International, at its Cambridge and Venice sessions, 1895, 1896, as against the efforts of MM. Kleen and Brusa to impose on States a duty of preventing carriage of contraband by its subjects (*Annuaire*, t. xiv. p. 191, t. xv. p. 205). It

has now received formal expression in The Hague Convention No. x. of 1907, Art. 7 of which lays down that "a neutral Power is *not* bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to an army or fleet."

CONTRABAND OF WAR

Sir,—As a good deal of discussion is evidently about to take place as to the articles which may be properly treated as contraband of war, and, in particular, as to coal being properly so treated, I venture to think that it may be desirable to reduce this topic (a sufficiently large one) to its true dimensions by distinguishing it from other topics with which it is too liable to be confused.

Articles are "contraband of war" which a belligerent is justified in intercepting while in course of carriage to his enemy, although such carriage is being effected by a neutral vessel. Whether any given article should be treated as contraband is, in the first instance, entirely a question for the belligerent Government and its Prize Court. A neutral Government has no right to complain of hardships which may thus be incurred by vessels sailing under its flag, but is bound to acquiesce in the views maintained by the belligerent Government and its Courts, unless these views involve, in the language employed by Lord Granville in 1861, "a flagrant violation of international law." This is the beginning and end of the doctrine of contraband. A neutral Government has none other than this passive duty of acquiescence. Its neutrality would not be compromised by the shipment from its shores, and the carriage by its merchantmen, of any quantity of cannon, rifles, and gunpowder.

Widely different from the above are the following three topics, into the consideration of which discussions upon contraband occasionally diverge :—

1. The international duty of the neutral Government not to allow its territory to become a base of belligerent operations: *e.g.* by the organisation on its shores of an expedition, such as that which in 1828 sailed from Plymouth in the interest of Dona Maria ; by the despatch from its harbours for belligerent use of anything so closely resembling an expedition as a fully equipped ship of war (as was argued in the case of the *Alabama*) ; by the use of its ports by belligerent ships of war for the reception of munitions of war, or, except under strict limitations, for the renewal of their stock of coal ; or by such an employment of its colliers as was alleged during the Franco-Prussian war to have implicated British merchantmen in the hostile operations of the French fleet in the North Sea. The use of the term "contraband" with reference to the failure of a neutral State to prevent occurrences of this kind is purely misleading.

2. The powers conferred upon a Government by legislation of restraining its subjects from intermeddling in a war in which the Government takes no part. Of such legislation our Foreign Enlistment Act is a striking example. The large powers conferred by it have no commensurable relation to the duties which attach to the position of neutrality. Its effect is to enable the Government to prohibit and punish, from abundant caution, many acts on the part of its subjects for which it would incur no international liability. It does empower the Government to prevent the use of its territory as a base, *e.g.* by aid directly rendered thence to a belligerent fleet ; but it, of course, gives no right

of interference with the export or carriage of articles which may be treated as contraband.

3. The powers conferred upon a Government by such legislation as section 150 of the Customs Consolidation Act, 1853, now reproduced in a later enactment, of forbidding at any time, by Order in Council, the export of articles useful in war. The power thus given has no relation to international duty, and is mainly intended to be exercised, in the way of self-protection, when Great Britain is, or is likely to be, engaged in war. The object of the enactment is to enable the Government to retain in the country articles of which we may ourselves be in need, or to prevent them from reaching the hands of our enemies. The articles enumerated —*e.g.* arms, ammunition, marine engines, &c.—are neither in the Act of 1853, nor in the Order in Council of the following year, described as "contraband of war."

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, March 5 (1904).

COAL FOR THE RUSSIAN FLEET

Sir,—The use of coal for belligerent purposes is, of course, of comparatively modern date, and it is hardly surprising to find that the mercantile community, as would appear from your marine insurance article of this morning, does not clearly distinguish between the different classes of questions to which such use may give rise. There is, indeed, a widely prevalent confusion, even in quarters which ought to be better informed, between two topics which it is essential to keep separate—*viz.* the shipment of contraband

and the use of neutral territory as a base for belligerent operations.

A neutral Government (our own at the present moment) occupies a very different position with reference to these two classes of acts. With reference to the former, its international duty (as also its national policy) is merely one of acquiescence. It is bound to stand aside, and make no claim to protect from the recognised consequences of their acts such of its subjects as are engaged in carriage of contraband. So far as the neutral Government is concerned, its subjects may carry even cannon and gunpowder to a belligerent port, while the belligerent, on the other hand, who is injured by the trade may take all necessary steps to suppress it.

Such is the compromise which long experience has shown to be both reasonable and expedient between the, in themselves irreconcilable, claims of neutral and belligerent States. So far, it has remained unshaken by the arguments of theorists, such as the Swedish diplomatist M. Kleen, who would impose upon neutral Governments the duty of preventing the export of contraband by their subjects. A British trader may, therefore, at his own proper risk, despatch as many thousand tons of coal as he chooses, just as he may despatch any quantity of rifles or bayonets, to Vladivostok or to Nagasaki.

It by no means follows that British shipowners may charter their vessels "for such purposes as following the Russian fleet with coal supplies." Lord Lansdowne's recent letter to Messrs. Woods, Tylor, and Brown is explicit to the effect that such conduct is "not permissible." Lord Lansdowne naturally confined himself to answering the question

which had been addressed by those gentlemen to the Foreign Office; but the reason for his answer is not far to seek. The unlawfulness of chartering British vessels for the purpose above mentioned is wholly unconnected with the doctrine of contraband, but is a consequence of the international duty, which is incumbent on every neutral State, of seeing that its territory is not made a base of belligerent operations. The question was thoroughly threshed out as long ago as 1870, when Mr. Gladstone said in the House of Commons that the Government had adopted the opinion of the law officers—

> "That if colliers are chartered for the purpose of attending the fleet of a belligerent and supplying it with coal, to enable it to pursue its hostile operations, such colliers would, to all practical purposes, become store-ships to the fleet, and would be liable, if within reach, to the operation of the English law under the (old) Foreign Enlistment Act."

British colliers attendant on a Russian fleet would be so undeniably aiding and abetting the operations of that fleet as to give just cause of complaint against us to the Government of Japan. The British shipper of coal to a belligerent fleet at sea, besides thus laying his Government open to a charge of neglect of an international duty, lays himself open to criminal proceedings under the Foreign Enlistment Act of 1870. By section 8 (3) and (4) of that Act, "any person within H.M. Dominions" who (subject to certain exceptions) equips or despatches any ship, with intent, or knowledge, that the same will be employed in the military or naval service of a foreign State, at war with any friendly State, is liable to fine or imprisonment, and to the forfeiture of the ship. By section 30, "naval service" covers "user as a store-ship," and "equipping" covers furnishing a ship with

"stores or any other thing which is used in or about a ship for the purpose of adapting her for naval service." Our Government has, therefore, ample powers for restraining, in this respect, the use of its territory as a base. It has no power, had it the wish (except for its own protection, under a different statute), to restrain the export of contraband of war.

It would tend to clearness of thought if the term "contraband" were never employed in discussions with reference to prohibition of the supply of coal to a belligerent fleet at sea.

Your obedient servant,

T. E. Holland.

Oxford, November 7 (1904).

THE BRITISH PROCLAMATION OF NEUTRALITY

Sir,—You were good enough to insert in your issue of November 9 some observations which I had addressed to you upon the essential difference between carriage of contraband, which takes place at the risk of the neutral shipowner, and use of neutral territory as a base for belligerent operations, an act which may implicate the neutral Power internationally, while also rendering the shipper liable to penal proceedings on the part of his own Government. I am gratified to find that the views thus expressed by me are in exact accordance with those set forth by Lord Lansdowne in his reply of November 25 to the Chamber of Shipping of the United Kingdom. Perhaps you will allow me to say something further upon the same subject, suggested by several letters which appear in your paper of this morning.

I am especially desirous of emphasising the proposition that carriage of contraband is no offence, either against international law or against the law of England.

1. The rule of international law upon the subject may, I think, be expressed as follows :—" A belligerent is entitled to capture a neutral ship engaged in carrying contraband of war to his enemy, to confiscate the contraband cargo, and, in some cases, to confiscate the ship also, without thereby giving to the Power to whose subjects the property in question belongs any ground for complaint." Or, to vary the phrase, " a neutral Power is bound to acquiesce in losses inflicted by a belligerent upon such of its subjects as are engaged in adding to the military resources of the enemy of that belligerent." This is the rule to which the nations have consented, as a compromise between the right of the neutral State, that its subjects should carry on their trade without interruption, and the right of the belligerent State to prevent that trade from bringing an accession of strength to his enemy. International law here, as always, deals with relations between States, and has nothing to do with the contraband trader, except in so far as it deprives him of the protection of his Government. If authority were needed for what is here advanced, it might be found in Mr. Justice Story's judgment in " The Santissima Trinidad," in President Pierce's message of 1854, and in the statement by the French Government in 1898, with reference to the case of the *Fram*, that " the neutral State is not required to prevent the sending of arms and ammunition by its subjects."

2. Neither is carriage of contraband any offence against the law of England ; as may be learnt, by any one

who is in doubt as to the statement, from the lucid language of Lord Westbury in "*Ex parte* Chavasse" (34 *L.J.*, Bkry., 17). And this brings me to the gist of this letter. I have long thought that the form of the Proclamation of Neutrality now in use in this country much needs reconsideration and redrafting. The clauses of the Proclamation which are set out by Mr. Gibson Bowles in your issue of this morning rightly announce that every person engaging in breach of blockade or carriage of contraband "will be justly liable to hostile capture and to the penalties denounced by the law of nations in that behalf, and will in no wise obtain protection from us against such capture or such penalties." So far, so good. But the Proclamation also speaks of such acts as those just mentioned as being done "in contempt of this our Royal Proclamation, in derogation of their duty as subjects of a neutral Power in a war between other Powers, or in violation or contravention of the law of nations in that behalf." It proceeds to say that all persons "who may misconduct themselves in the premises . . . will incur our high displeasure for such misconduct." I venture to submit that all these last-quoted phrases are of the nature of misleading rhetoric, and should be eliminated from a statement the effective purport of which is to warn British subjects of the treatment to which certain courses of conduct will expose them at the hands of belligerents, and to inform them that the British Government will not protect them against such treatment. The reason why our Government will abstain from interference is, not that such courses of action are offences either against international or English law, but that it has no right so to interfere; having become a party to a rule of international law, under which a neutral

Government waives the right, which it would otherwise possess, to protect the trade of its subjects from molestation.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, November 28 (1904).

THE BRITISH PROCLAMATION OF NEUTRALITY

Sir,—Inquiries which have reached me with reference to the observations which I recently addressed to you upon the British Proclamation of Neutrality induce me to think that some account of the development of the text of the proclamation now in use may be of interest to your readers. The proclamations with which I am acquainted conform to one or other of two main types, each of which has its history.

1. The earlier proclamations merely call attention to the English law against enlistments, &c., for foreign service; and command obedience to the law, upon pain of the penalties thereby inflicted, "and of his Majesty's high displeasure." In the proclamation of 1817, the tacit reference is doubtless to certain Acts of George II. which, having been passed for a very different purpose, and having proved inadequate in their new application, were repealed by the Foreign Enlistment Act of 1819. This is the Act to which reference is made in the proclamations of 1823 and 1825; in the former of which we first get a recital of neutrality; while in the latter the clause enjoining all subjects strictly to observe the duties of neutrality and to respect the exercise of belligerent rights first makes its appearance.

2. The proclamation of 1859 is of a very different character, bearing traces of the influence of the ideas which had inspired the action of President Washington in 1793. While carrying on the old, it presents several new features. British subjects are enjoined to abstain from violating, not only "the laws and statutes of the realm," but also (for the first time) "the law of nations." They are also (for the first time) warned that, if any of them "shall presume, in contempt of this our Royal Proclamation, and of our high displeasure, to do any acts in derogation of their duty as subjects of a neutral Sovereign, . . . or in violation of the law of nations, . . . as, more especially," by breach of blockade, or carriage of contraband, &c., they will "rightfully incur, and be justly liable to, hostile capture, and to the penalties denounced by the law of nations in that behalf"; and notice is (for the first time) given that those "who may misconduct themselves in the premises will do so at their peril, and of their own wrong; and that they will in no wise obtain any protection from Us against such capture, or such penalties as aforesaid, but will, on the contrary, incur Our high displeasure by such misconduct."

The proclamations of 1861 and February and March, 1866, complicate matters, by making the warning clause as to blockade and contraband apply also to the statutory offences of enlistment, &c.; but the proclamation of June, 1866, gets rid of this complication by returning to the formula of 1859, which has been also followed in 1870, 1877, 1898, and in the present year.

The formula as it now stands, after the process of growth already described, may be said to consist of seven parts—*viz.* (1) a recital of neutrality; (2) a command to subjects

to observe a strict neutrality, and to abstain from contravention of the laws of the realm or the law of nations in relation thereto ; (3) a recital of the Foreign Enlistment Act of 1870 ; (4) a command that the statute be obeyed, upon pain of the penalties thereby imposed, "and of Our high displeasure" ; (5) a warning to observe the duties of neutrality, and to respect the exercise of belligerent rights ; (6) a further warning to those who, in contempt of the proclamation "and of Our high displeasure," may do any acts "in derogation of neutral duty, or in violation of the law of nations," especially by breach of blockade, carriage of contraband, &c., that they will be liable to capture "and to the penalties denounced by the law of nations" ; (7) a notification that persons so misconducting themselves "will in no wise obtain any protection from Us," but will, "on the contrary, incur Our high displeasure by such misconduct."

The question which I have ventured to raise is whether the *textus receptus*, built up, as it has been, by successive accretions, is sufficiently in accordance with the facts to which it purports to call the attention of British subjects to be properly submitted to His Majesty for signature. I would suggest for consideration :—1. Whether the phrases commanding obedience, on pain of His Majesty's "high displeasure," and the term "misconduct," should not be used only with reference to offences recognised as such by the law of England. 2. Whether such condensed, and therefore incorrect, though very commonly employed, expressions as imply that breach of blockade and carriage of contraband are "in violation of the law of nations," and are liable to "the penalties denounced by the law of nations," should not be replaced by expressions more scientifically correct.

The law of nations neither prohibits the acts in question nor prescribes penalties to be incurred by the doers of them. What it really does is to define the measures to which a belligerent may resort for the suppression of such acts, without laying himself open to remonstrance from the neutral Government to which the traders implicated owe allegiance.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, December 5 (1904).

BELLIGERENT FLEETS IN NEUTRAL WATERS

Sir,—A novel question as to belligerent responsibilities would be suggested for solution if, as seems to be reported in Paris, Admiral Rozhdestvensky over-stayed his welcome in the waters of Madagascar, although ordered to leave them by his own Government in compliance with " pressing representations " on the part of the Government of France.

A much larger question is, however, involved in the discussion which has arisen as to the alleged neglect by France to prevent the use of her Cochin-Chinese waters by the Russians as a base of operations against Japan. We are as yet in the dark as to what is actually occurring in those waters, and are, perhaps, for that very reason in a better position for endeavouring to ascertain what are the obligations imposed on a neutral in such a case by international law.

It is admitted on all hands that a neutral Power is bound not to permit the " asylum " which she may grant to ships of war to be so abused as to render her waters a " base of operations " for the belligerent to which those ships belong.

Beyond this, international law speaks at present with an uncertain voice; leaving to each Power to resort to such measures in detail as may be necessary to ensure the due performance of a duty which, as expressed in general terms, is universally recognised.

The rule enforced since 1862 by Great Britain for this purpose limits the stay of a belligerent warship, under ordinary circumstances, to a period of twenty-four hours; and the same provision will be found in the neutrality proclamations issued last year by, *e.g.* the United States, Egypt, China, Denmark, Sweden and Norway. So by Japan and Russia in 1898. This rule, convenient and reasonable as it is, is not yet a rule of international law; as Lord Percy has had occasion to point out, in replying to a question addressed to him in the House of Commons. The proclamations of most of the Continental Powers do not commit their respective Governments to any period of time, and the material clauses of the French circular, to which most attention will be directed at the present time, merely provide as follows :—

"(1) En aucun cas, un belligérant ne peut faire usage d'un port Français, ou appartenant à un État protégé, dans un but de guerre, &c. (2) La durée du séjour dans nos ports de belligérants, non accompagnés d'une prise, n'a été limitée par aucune disposition spéciale; mais pour être autorisés à y séjourner, ils sont tenus de se conformer aux conditions ordinaires de la neutralité, qui peuvent se résumer ainsi qu'il suit :—(*a*) . . . (*b*) Les dits navires ne peuvent, *à l'aide de ressources puisées à terre*, augmenter leur matériel de guerre, renforcer leurs équipages, ni faire des enrôlements volontaires, même parmi leurs nationaux." (*c*) Ils doivent s'abstenir de toute enquête sur les forces, l'emplacement ou les ressources de leurs ennemis, ne pas appareiller brusquement pour poursuivre ceux qui leur seraient signalés; en un mot, s'abstenir de faire du lieu de leur résidence la base d'une opération quelconque contre l'ennemi. (3) Il ne peut être fourni à un belligérant que les vivres, denrées, et moyens de réparations nécessaires à la subsistance de son équipage ou à la sécurité de sa navigation."

Under the twenty-four hours rule, the duty of the neutral Government is clear. Under the French rules, all must evidently turn upon the wisdom and *bonne volonté* of the officials on the spot, and of the home Government, so far as it is in touch with them. We have no reason to suppose that the qualities in question will not characterise the conduct of the French at the present moment. There can, however, be no doubt that a better definition of the mode in which a neutral Power should prevent abusive use of the asylum afforded by its ports and waters is urgently required. The point is one which must prominently engage the attention of the special conference upon the rights and duties of neutrals, for which a wish was expressed by The Hague Conference of 1899, and, more recently, by President Roosevelt.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, April 20 (1905).

Section 3

Carriage of Contraband. (*Absolute and Conditional Contraband*: *Continuous Voyages*: *Unqualified Captors*: *The Declaration of London*)

The letters included in the preceding section touched incidentally upon carriage of contraband, in relation to other departments of the law affecting neutrals. The eight letters which follow, suggested respectively by the Spanish-American, the Boer, and the Russo-Japanese wars, deal exclusively with this topic, which seems likely to be henceforth governed, no longer only by customary and judge-made law, but largely also by written rules, such as those provided by the, as yet unratified, Declaration of London of 1909.

As to this Declaration, some observations will be found at the end of this section, and, more fully, at the end of Section 6.

(*Absolute and Conditional Contraband*)

The divergence which has so long existed between Anglo-American and Continental views upon contraband was very noticeable at the commencement of the war of 1898, which gave occasion to the letter which immediately follows. While the Spanish Decree of April 23 sets out only one list of contraband goods, the United States Instructions of June 20 recognise two lists, *viz.* of "absolute" and of "conditional" contraband, including under the latter head "coal when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs, and money, when such materials or money are destined for an enemy's forces, provisions, when destined for an enemy's ship or ships, or for a place besieged."

An answer was thus supplied to the question suggested in this letter, as to articles *ancipitis usus*.

CONTRABAND OF WAR

Sir,—I fear that the mercantile community will hardly profit so much as the managers of the Atlas Steamship Company seem to expect by the information contained in their letter which you print this morning. It was, indeed, unlikely that the courteous reply of the Assistant Secretary of State at Washington to the inquiry addressed to him by the New York agents of the company would contain a declaration of the policy of the United States with reference to contraband of war. The threefold classification of "merchandise" (not of "contraband") quoted in the reply occurs, in the judgment of the Supreme Court in the well-known case of the *Peterhoff* (5 Wallace, 58), but it is substantially that of Grotius, and has long been accepted in this country and in the United States, while the Continent is, generally speaking,

inclined to deny the existence of "contraband by accident," and to recognise only such a restricted list of contraband as was contained in the Spanish decree of April 24 last.

The questions upon which shippers are really desirous of information (which they are, however, perhaps not likely to obtain, otherwise than from decisions of prize Courts) are of a less elementary character. They would like to know what articles *ancipitis usus* ("used for purposes of war or peace according to circumstances") will be treated by the United States as contraband, and with what penalty the carriage of such articles will be visited—*i.e.* whether by confiscation or merely by pre-emption.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, May 9 (1898).

The four letters which next follow also relate to the two classes of contraband goods, with especial reference to the character attributed to foodstuffs, coal, and cotton.

On foodstuffs, see the *Report of the Royal Commission on the Supply of Food, &c., in time of War*, 1905. *Cf.* also the last paragraph in the first letter in Section 5, *infra*. They are placed by the Declaration of London, Art. 24, in the class of conditional contraband; as is also coal. By Art. 28 of the Declaration, raw cotton is enumerated among the articles which cannot be declared contraband of war.

The suggestion, in the letter of February 20, 1904, that certain words quoted from the Japanese Instructions had been mistransmitted or misquoted was borne out by the *Regulations governing captures at sea*, issued on March 15, 1904, Art. 14 of which announces that certain goods are contraband "in case they are destined to the enemy's army or navy, or in case they are destined to the enemy's territory, and from the landing place it can be inferred that they are intended for military purposes."

The letters of March 10 and 15, 1905, will sufficiently explain themselves. The accuracy of the statements contained in them was vouched for by Baron Suyematsu, in a letter which appeared in *The Times* for March 16, to the effect that: "In Japan the matters relating to the organisation and procedure of the prize court, and the matters relating to prize, contraband goods, &c., are regulated by two separate sets of laws. . . . The so-called prize court law of August 20, 1894, and amendment dated March 1, 1904, which your correspondent refers to, are the provisions relating to the former matters. The rules regulating the latter matters, *viz.* prize, contraband goods, &c., are not comprised in them. The rules which relate to the latter matters, as existing at present, are consolidated and comprised in an enactment which was issued on March 7, 1904 . . . Under the circumstances, I can only repeat what Professor Holland says . . . in other words, I fully concur with the views taken by the Professor."

The distinction between articles which are "absolutely contraband," those which are "conditionally contraband," and those which are incapable of being declared contraband, is now expressly adopted in Arts. 22, 24, and 28 of the Declaration of London of 1909.

IS COAL CONTRABAND OF WAR?

Sir,—This question has now been answered, in unmistakable terms, on behalf of this country by Lord Lansdowne in his reply, which you printed yesterday, to Messrs. Powley, Thomas, and Co., and on behalf of Japan by the proclamation which appears in *The Times* of to-day. Both of these documents set forth the old British doctrine, now fully adopted in the United States, and beginning to win its way on the Continent of Europe, that, besides articles which are absolutely contraband, other articles *ancipitis usus*, and amongst them coal, may become so under certain conditions. "When destined," says Lord Lansdowne, "for warlike as opposed to industrial use." "When destined," says Japan,

" for the enemy's army or navy, or in such cases where, *being goods arriving at enemy's territory*, there is reason to believe that they are intended for use of enemy's army or navy."

I may say that the words which I have italicised must, I think, have been mistranslated or mistransmitted. Their intention is, doubtless, substantially that which was more clearly expressed in the Japanese proclamation of 1894 by the words—" Either the enemy's fleet at sea or a hostile port used exclusively or mainly for naval or military equipment."

A phrase in your issue of to-day with reference to the Cardiff coal trade suggests that it may be worth while to touch upon the existence of a widely-spread confusion between the grounds on which export of coal may be prohibited by a neutral country and those which justify its confiscation, although on board a neutral ship, by a belligerent. A neutral State restrains, under certain circumstances, the export of coal, not because coal is contraband, but because such export is converting the neutral territory into a base of belligerent operations. The question of contraband or no contraband only arises between the neutral carrier and the belligerent when the latter claims to be entitled to interfere with the trade of the former.

Since the rules applicable to the carriage of coal are, I venture to think, equally applicable to the carriage of foodstuffs, I may perhaps be allowed to add a few words with reference to the letter addressed to you a day or two ago by Sir Henry Bliss. I share his desire for some explanation of the telegram which reached you on the 12th of this month from British Columbia. One would like to know—(1) What is " the Government," if any, which has instructed the Empress Line not to forward foodstuffs to Japan ; (2) whether

the refusal relates to foodstuffs generally, or only to those with a destination for warlike use; (3) what is meant by the statement that "the steamers of the Empress Line belong to the Naval Reserve"? I presume the meaning to be that the line is subsidised with a view to the employment of the ships of the company as British cruisers when Great Britain is at war. The bearing of this fact upon the employment of the ships when Great Britain is at peace is far from apparent. It is, of course, possible that the Government contract with the company may have been so drawn, *ex abundanti cautela*, as greatly to restrict what would otherwise have been the legitimate trade of the company.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, February 20 (1904).

COTTON AS CONTRABAND OF WAR

Sir,—The text of the decision of the Court of Appeal at St. Petersburg in the case of the *Calchas* has at length reached this country, and we are thus informed, upon the highest authority, though, perhaps, not in the clearest language, of the meaning which is now to be placed upon the Russian notification that cotton is contraband of war.

This notification, promulgated on April 21, 1904, was received with general amazement, not diminished by an official gloss to the effect that it "applied only to raw cotton suitable for the manufacture of explosives, and not to yarn or tissues." It must be remembered that at the date mentioned, and for some months afterwards, Russia stoutly maintained that all the articles enumerated in her list of

contraband of February 28, 1904, and in the additions to that list, were "absolutely" such—*i.e.* were confiscable if in course of carriage to any enemy's port, irrespectively of the character of that port, or of the use to which the articles would probably be put. It was only after much correspondence, and the receipt of strong protests from Great Britain and the United States, that Russia consented to recognise the well-known distinction between "absolute" and "conditional" contraband; the latter class consisting of articles useful in peace as well as for war, the character of which must, therefore, depend upon whether they are, in point of fact, destined for warlike or for peaceful uses. This concession was made about the middle of September last, and it was then agreed that provisions should be placed in the secondary category (as was duly explained in the Petersburg judgment in the case of the *Arabia* on December 14) together with some other articles, among which it seemed that raw cotton was not included.

The final decision in the *Calchas* case marks a welcome change of policy. Cotton has now followed foodstuffs into the category of "conditional" contraband, and effect has so far been given to the representations on the subject made by Mr. Hay in circular despatches of June 10 and August 30, 1904, and by Sir Charles Hardinge, in a note presented to Count Lamsdorff on October 9 of the same year.

The question had become a practical one in the case of the *Calchas*. On July 25 this vessel, laden with, *inter alia*, nine tons of raw cotton for Yokohama and Kobe, was seized by a Russian cruiser and carried into Vladivostok, where, on September 13, the cotton, together with other portions of her cargo, was condemned as absolutely contraband. The

reasons for repudiating this decision, and the notification to which it gave effect, were not far to seek, and it may still be worth while to insist upon them. As against Russia, it is well to recall that, from the days of the Armed Neutralities onwards, her traditional policy has been to favour a very restricted list of contraband; that when in 1877, as again in 1900 and 1904, she included in it materials "servant de faire sauter les obstacles," the examples given of such materials were things so immediately fitted for warlike use as "les mines, les torpilles, la dynamite," &c.; and that what is said as to "conditional contraband" by her trusted adviser, Professor de Martens, in his *Droit International*, t. iii. (1887), pp. 351–354, can scarcely be reconciled with her recent action.

But a still stronger argument against the inclusion of cotton in the list of "absolute" contraband is that this is wholly without precedent. It has, indeed, been alleged that cotton was declared to be "contraband" by the United States in their Civil War. The Federal proclamations will, however, be searched in vain for anything of the kind. The mistake is due to an occasional loose employment of the term, as descriptive of articles found by an invader in an enemy's territory, which, although the property of private, and even neutral, individuals, happen to be so useful for the purposes of the war as to be justly confiscated. That this was so will appear from an attentive reading of the case of *Mrs. Alexander's Cotton*, in 1861 (2 Wallace, 404), and of the arguments in the claim made by Messrs. Maza and Larrache against the United States in 1886 (Foreign Relations of U.S., 1887). A similarly loose use of the term was its application by General B. F. Butler to runaway slaves who had been employed on

military works ; an application of which he confessed himself "never very proud as a lawyer," though "as an executive officer, much comforted with it." The phrase caught the popular fancy, came to be applied to slaves generally, and was immortalised in a song, long a favourite among negro children, the refrain of which was "I'se a happy little contraband."

The decision of the Court of St. Petersburg in the case of the *Calchas*, so far as it recognises the existence of a conditional class of contraband, and that raw cotton, as *res ancipitis usus*, must be treated in accordance with the rules applicable to goods belonging to that class, has laid down an unimpeachable proposition of law. Whether the view taken by the Court of the facts of the case, so far as they relate to the cotton cargo, is equally satisfactory is a different and less important question, upon which I refrain from troubling you upon the present occasion.

I am, Sir, your obedient servant,

T. E. Holland.

Temple, July 1 (1905).

P.S.—It may be worth while to add, for the benefit of those only who care to be provided with a clue (not to be found in the judgment) through the somewhat labyrinthine details of the question under discussion, a summary of its history. The Russian rules as to contraband are contained in several documents—*viz.* the "Regulations as to Naval Prize" of 1895, Arts. 11–14 ; the "Admiralty Instructions" of 1900, Arts. 37, 38, and the appended "Special Declaration" as to the articles considered to be contraband (partly modelled on the list of 1877) ; the "Imperial Order" of

February 28, 1904, rule 6 (this order keeps alive the rules of 1895 and 1900, except in so far as they are varied by it); the "Order" of March 19, 1904, defining "food" and bringing machinery of certain kinds into the list of contraband; the "Order," of April 21, 1904, bringing "raw cotton" into the list; and, lastly, the "Instructions" of September 30 and October 23, 1904, recognising, in effect, a class of "conditional" contraband, placing foodstuffs in this class, as also, ultimately, other objects "capable of warlike use and not specified in sections 1–9 of rule 6."

JAPANESE PRIZE LAW

Sir,—I hope you will allow me space for a few words with reference to some statements occurring to-day in your Marine Insurance news which I venture to think are of a misleading character.

Your Correspondent observes that—

"Although the Japanese are signatories to the Treaty of Paris, it should not be forgotten that they have a Prize Court law of their own (August 20, 1894), and are more likely to follow its provisions, in dealing with the various captured steamers, than the general principles of the Treaty of Paris."

Upon this paragraph let me remark:—

1. The action of the Japanese is in full accordance with the letter and spirit of all four articles of the Declaration of Paris. ("The Treaty of Paris" has, of course, no bearing upon prize law.)

2. "The general principles" of that Declaration is a phrase which conveys to me, I confess, no meaning.

3. The Japanese have, of course, a prize law of their own, borrowed, for the most part, from our own Admiralty

Manual of Prize Law. Neither the British nor the Japanese instructions are in conflict with, or indeed stand in any relation to, the Declaration of Paris.

4. The existing prize law of Japan was promulgated on March 7, 1904, not on August 20, 1894.

Your Correspondent goes on to say that the Japanese definition of contraband "is almost as sweeping as was the Russian definition, to which the British Government took active objection last summer." So far is this from being the case that the Japanese list is practically the same as our own, both systems recognising the distinction between "absolute" and "conditional" contraband, which, till the other day, was ignored by Russia.

The Japanese rules as to the cases in which ships carrying contraband may be confiscated are quite reasonable and in accordance with British views. The third ground for confiscation mentioned by your Correspondent does not occur in the instructions of 1904.

Ships violating a blockade are, of course, confiscable; but the Japanese do not, as your Correspondent seems to have been informed, make the existence of a blockade conditional upon its having been "notified to the Consuls of all States in the blockaded port." Commanders are, no doubt, instructed to notify the fact, "as far as possible, to the competent authorities and the Consuls of the neutral Powers within the circumference of the blockade"; but that is a very different thing.

I am, Sir, your obedient servant,

T. E. Holland.

The Athenæum, March 10 (1905).

Sir,—Let me assure your correspondent upon Marine Insurance that I have been familiar, ever since its promulgation, with the Japanese prize law of 1894, quoted by him as authority for statements made in your issue of March 10, the misleading character of which I felt bound to point out in a letter of the same date. All the topics mentioned by him on that occasion, and to-day, are, however, regulated, not by that law, but by notifications and instructions issued from time to time during 1904.

I make it my business not only to be authoritatively informed on such matters, but also to see that my information is up to date.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, March 15 (1905).

(*Continuous Voyages*)

The opinion expressed in the letter which immediately follows, that the American decisions, applying to carriage of contraband the doctrine of "continuous voyages," seem to be "demanded by the conditions of modern commerce, and might well be followed by a British prize Court," was referred to by Lord Salisbury in a despatch of January 10, 1900, to be communicated to Count von Bülow, with reference to the seizure of the *Bundesrath*. *Parl. Papers*, Africa, No. 1 (1900), p. 19.

The distinction, drawn in the same letter, between "carriage of contraband" and "enemy service," which has sometimes been lost sight of, has been recently established in the case of *Yangtsze Insurance Association* v. *Indemnity Mutual Marine Company*, [1908] 1 K. B. 910, in which it was held by Bigham, J., that the transport of military officers of a belligerent State, as passengers in a neutral ship, is not breach of a warranty against contraband of war in a policy of marine insurance. The carriage of enemy despatches can no longer be generally treated as "enemy service"

should The Hague Convention, No. xi. of 1907, be adequately ratified; since, by Art. 1 of that Convention, it is provided that, except in case of breach of blockade, "the postal correspondence of neutrals *or belligerents*, whether of *an official* or a private character, found on board a *neutral* or enemy ship on the High Seas is inviolable."

The case of the *Allanton*, which gave occasion for the letter of July 11, 1904, was as follows. This British ship left Cardiff on February 24 of that year, with a cargo of coal, to be delivered either at Hong-Kong or Sasebo. On arrival at Hong-Kong, she found orders to deliver at Sasebo, and, having made delivery accordingly, was chartered by a Japanese company at another Japanese port, to carry coal to a British firm at Singapore. On her way thither, she was captured by a Russian squadron and taken in to Vladivostok, where on June 24 she was condemned by the prize Court for carriage of contraband. The Court held, ignoring the rule that a vessel ceases to be *in delicto* when she has "deposited" her contraband (since affirmed by Art. 38 of the Declaration of London of 1909), that she was liable in respect of her voyage to Sasebo; as also in respect of the voyage on which she was captured, on the ground that her real destination was at that time the Japanese fleet, or some Japanese port. This decision was reversed, as to both ship and cargo, by the Court of Appeal at St. Petersburg, on October 22 of the same year.

The doctrine of "continuous voyages" is by the Declaration of London, Art. 30, recognised in the case of "absolute," but, by Art. 35, stated to be inapplicable to the case of "conditional" contraband.

PRIZE LAW

Sir,—Questions of maritime international law which are likely to give rise not only to forensic argument in the prize Courts which we have established at Durban and at the Cape, but also to diplomatic communications between Great Britain and neutral Governments, should obviously be handled just now with a large measure of

reserve. Lord Rosebery has, however, in your columns called upon our Government to define its policy with reference to foodstuffs as contraband of war, while several other correspondents have touched upon cognate topics. You may perhaps therefore be disposed to allow one who is responsible for the *Admiralty Manual of the Law of Prize*, to which reference has been made by your correspondent "S.," to make a few statements as to points upon which it may be desirable for the general reader to be in possession of information accurate, one may venture to hope, as far as it goes.

Of the four inconveniences to which neutral trading vessels are liable in time of war, "blockade" may be left out of present consideration. You can only blockade the ports of your enemy, and the South African Republics have no port of their own. The three other inconveniences must, however, all be endured—*viz.* prohibition to carry "contraband," prohibition to engage in "enemy service," and liability to be "visited and searched" anywhere except within three miles of a neutral coast, in order that it may be ascertained whether they are disregarding either of these prohibitions, as to the meaning of which some explanation may not be superfluous.

1. "Carriage of contraband" implies (1) that the goods carried are fit for hostile use; (2) that they are on their way to a hostile destination. Each of these requirements has given rise to wide divergence of views and to a considerable literature. As to (1), while Continental opinion and practice favour a hard and fast list of contraband articles, comprising only such as are already suited, or can readily be adapted, for use in operations of war, English and American opinion and

practice favour a longer list, and one capable of being from time to time extended to meet the special exigencies of the war. In such a list may figure even provisions, "under circumstances arising out of the particular situation of the war," especially if "going with a highly probable destination to military use"—Lord Stowell in the *Jonge Margaretha* (1 Rob. 188); *cf.* Story, J., in the *Commercen* (1 Wheat. 382), the date and purport of which are, by-the-by, incorrectly given by "S." It would be in accordance with our own previous practice and with Lord Granville's despatches during the war between France and China in 1885, if we treated flour as contraband only when ear-marked as destined for the use of enemy fleets, armies, or fortresses. Even in such cases our practice has been not to confiscate the cargo, but merely to exercise over it a right of "pre-emption," so as to deprive the enemy of its use without doing more injury than can be helped to neutral trade—as is explained by Lord Stowell in the *Haabet* (2 Rob. 174). As to (2) the rule was expressed by Lord Stowell to be that "goods going to a neutral port cannot come under the description of contraband, all goods going there being equally lawful"—*Imina* (3 Rob. 167); but innovations were made upon this rule during the American Civil War which seem to be demanded by the conditions of modern commerce and might well be followed by a British prize Court. It was held that contraband goods, although *bona fide* on their way to a neutral port, might be condemned if intended afterwards to reach the enemy by another ship or even by means of land carriage—*Bermuda* (3 Wallace); *Peterhoff* (5 Wallace). A consignment to Lorenzo Marques, connected as is the town by only forty miles of railway with the Transvaal frontier, would

seem to be well within the principles of the Civil War cases as to "continuous voyages."

2. The carriage by a neutral ship of enemy troops, or of even a few military officers, as also of enemy despatches, is an "enemy service" of so important a kind as to involve the confiscation of the vessel concerned, a penalty which, under ordinary circumstances, is not imposed upon carriage of "contraband" properly so-called. See Lord Stowell's luminous judgments in *Orozembo* (6 Rob. 430) and *Atalanta* (*ib.* 440). The alleged offence of the ship *Bundesrath* would seem to be of this description.

The questions, both of "contraband" and of "enemy service," with which our prize Courts must before long have to deal, will be such as to demand from the Judges a competent knowledge of the law of prize, scrupulous fairness towards neutral claimants, and prompt penetration of the Protean disguises which illicit trade so readily assumes in time of war.

Your obedient servant,

T. E. Holland.

Oxford, January 2 (1900).

THE *ALLANTON* (*Continuous Voyage*)

Sir,—I venture to think that the letter which you print this morning from my friend Dr. Baty, with reference to the steamship *Allanton*, calls for a word of warning; unless, indeed, it is to be taken as merely expressing the private opinion of the writer as to what would be a desirable rule of law.

It would be disastrous if shipowners and insurers were to assume that a neutral vessel, if destined for a neutral

port, is necessarily safe from capture. Words at any rate capable of this construction may, no doubt, be quoted from one of Lord Stowell's judgments, now more than a century old; but many things have happened, notably the invention of railways, since the days of that great Judge. The United States cases, decided in the sixties (as Dr. Baty thinks, "on a demonstrably false analogy"), in which certain ships were held to be engaged in the carriage of contraband, although their destination was a neutral port, were substantially approved of by Great Britain. Their principle was adopted by Italy, in the *Doelwijk*, in 1896, and was supported by Great Britain in the correspondence upon this subject which took place with Germany in 1900. It was endorsed, after prolonged discussion, by the Institut de Droit International in 1896.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, July 11 (1904).

(*Unqualified Captors*)

Among the objections raised by the British Government to the capture by the Russian ship *Peterburg* in the Red Sea, on July 13, 1904, of the P. and O. ss. *Malacca*, for carriage of contraband, were (1) that the so-called contraband consisted of government ammunition for the use of the British fleet in Chinese waters; and (2) what was more serious, that the capturing vessel, which belonged to the Russian volunteer fleet, after issuing from the Black Sea under the commercial flag, had subsequently, and without touching at any Russian port, brought up guns from her hold, and had proceeded to exercise belligerent rights under the Russian naval flag. In consequence of the protest of the British Government, and to close the incident, the *Malacca* was released at Algiers, after a purely formal

examination, on July 27, and Russia agreed to instruct the officers of her volunteer fleet not to make any similar captures.

The question of the legitimacy of the transformation on the High Seas into a ship-of-war of a vessel which has previously been sailing under the commercial flag was much discussed at The Hague Conference of 1907, but without result. Opinions were so much divided upon the point, that no mention of it is made in Convention No. vii. of that year, "as to the transformation of merchant vessels into ships-of-war."

THE *ALLANTON* (*Unqualified Captors*)

Sir,—The indignation caused by the treatment of the *Allanton* is natural, and will almost certainly prove to be well founded; but Mr. Rae, in the letter which you print this morning, overstates a good case. He asks that, "whatever steps are taken for the release of the *Malacca*, equally strong steps should be taken for the release of the *Allanton*"; and he can see no difference between the cases of the two ships, except that the former is owned by a powerful company in the habit of carrying British mails, while the latter is his private property.

One would have supposed it to be notorious that the facts which distinguish the one case from the other are, first, that the capture of the *Malacca* was effected by a vessel not entitled to exercise belligerent rights; and, secondly, that Great Britain is prepared to claim the incriminated cargo as belonging to the British Government. Capture by an unqualified cruiser is so sufficient a ground for a claim of restoration and compensation that, except perhaps as facilitating the retreat of Russia from a false position, it would seem, to say the least, superfluous to pray in aid

any other reason for the cancellation of an act unlawful *ab initio*.

I have not noticed any statement as to the actual constitution of the prize Court concerned in the condemnation of the *Allanton*. Under Rule 54 of the Russian Naval Regulations of 1895, a "Port Prize Court" must, for a decree of confiscation, consist of six members, of whom three must be officials of the Ministries of Marine, Justice, and Foreign Affairs respectively. An "Admirals' Prize Court," for the same purpose, need consist of only four members, all of whom are naval officers.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, July 25 (1904).

(*Note upon the Declaration of London*)

The British delegates to The Hague Conference of 1907 were instructed that H.M. Government "are ready and willing for their part, in lieu of endeavouring to frame new and more satisfactory rules for the prevention of contraband trade in the future, to abandon the principle of contraband of war altogether, thus allowing the oversea trade in neutral vessels between belligerents on the one hand and neutrals on the other, to continue during war without any restriction," except with reference to blockades. This proposal was not accepted by the Conference, which was unable even to agree upon lists of contraband articles, and recommended that the question should be further considered by the Governments concerned. *Parl. Paper, Miscell.* No. 1 (1908), p. 194.

This task was accordingly among those undertaken at the Conference of Maritime Powers held in London in 1908–1909, which resulted in a Declaration, Articles 22–44 of which constitute a fairly complete code of the law of contraband. Reference has already been made to several articles of this Declaration, in comments upon letters comprised in this section. It must,

however, not be forgotten that the Declaration has not yet been ratified, and must be ratified by each Power as a whole, or not at all, since Article 65 provides that "the provisions of the present Declaration form an indivisible whole." *Cf.* the somewhat similar language, as to the "indivisibilité" of the four articles of the Declaration of Paris, contained in the 24th Protocol of the Paris Congress.

Section 4

Methods of warfare as affecting neutrals

(*Privateers*: *Mines*: *Cable-cutting*)

(*Privateers*)

The three letters which immediately follow were written to point out that neither belligerent in the war of 1898 was under any obligation not to employ privateers. Within, however, a few days after the date of the second of these letters, both the United States and Spain, though both still to be reckoned among the few Powers which had not acceded to the Declaration of Paris, announced their intention to conduct the war in accordance with the rules laid down by the Declaration.

Art. 3 of the Spanish Royal Decree of April 23 was to the effect that "notwithstanding that Spain is not bound by the Declaration signed in Paris on April 16, 1856, as she expressly stated her wish not to adhere to it, my Government, guided by the principles of international law, intends to observe, and hereby orders that the following regulations for maritime law be observed," *viz.* Arts. 2, 3, and 4 of the Declaration, after setting out which the Decree proceeds to state that the Government, while maintaining "their right to issue letters of marque, . . . will organise, for the present, a service of auxiliary cruisers . . . subject to the statutes and jurisdiction of the Navy."

The Proclamation of the President of the United States, of April 26, recites the desirability of the war being "conducted upon principles in harmony with the present views of nations,

and sanctioned by their recent practice," and that it " has already been announced that the policy of the Government will not be to resort to privateering, but to adhere to the rules of the Declaration of Paris," and goes on to adopt rules 2, 3, and 4 of the Declaration.

Ten years afterwards, *viz.* on January 18, 1908, Spain signified " her entire and definitive adhesion to the four clauses contained in the Declaration," undertaking scrupulously to conduct herself accordingly. Mexico followed suit on February 13, 1909. The United States are therefore now the only important Power which has not formally bound itself not to employ privateers. It seems unlikely that privateers, in the old sense of the term, will be much heard of in the future, though many questions may arise as to " volunteer navies " and subsidised liners, such as those touched upon in the last section, with reference to captures made by the *Malacca*.

OUR MERCANTILE MARINE IN WAR TIME

Sir,—There can be no doubt that serious loss would be occasioned to British commerce by a war between the United States and Spain in which either of those Powers should exercise its right of employing privateers or of confiscating enemy goods in neutral bottoms.

Before, however, adopting the measures recommended, with a view to the prevention of this loss, by Sir George Baden-Powell in your issue of this morning, it would be desirable to inquire how far they would be in accordance with international law, and what would be the net amount of the relief which they would afford.

It is hardly necessary to say that non-compliance with the provisions of the Declaration of Paris by a non-signatory carries with it none of the consequences of a breach of the law of nations. The framers of that somewhat hastily conceived attempt to engraft a paper amendment

upon the slowly matured product of œcumenical opinion, far from professing to make general law, expressly state that the Declaration "shall not be binding except upon those Powers who have acceded, or shall accede, to it." As regards Spain and the United States the Declaration is *res inter alios acta.*

It follows that in recommending that any action taken by privateers against British vessels should be treated as an act of piracy Sir George Baden-Powell is advocating an inadmissible atrocity, which derives no countenance from the view theoretically maintained by the United States at the outset of the Civil War of the illegality of commissions granted by the Southern Confederation. His recommendation that our ports should be "closed" to privateers is not very intelligible. Privateers would, of course, be placed under the restrictions which were imposed in 1870, in accordance with Lord Granville's instructions, even on the men-of-war of belligerents. They would be forbidden to bring in prizes, to stay more than twenty-four hours, to leave within twenty-four hours of the start of a ship of the other belligerent, to take more coal than enough to carry them to the nearest home port, and to take any further supply of coal within three months. We might, no doubt, carry discouragement of privateers by so much further as to make refusal of coal absolute in their case, but hardly so far as to deny entry to them under stress of weather.

The difficulties in the way of accepting Sir G. Baden-Powell's other suggestion are of a different order. Although we could not complain of the confiscation by either of the supposed belligerents of enemy property found in British

vessels as being a violation of international duty, we might at our own proper peril announce that we should treat such confiscation as "an act of war." International law has long abandoned the attempt to define a "just cause of war." That must be left to the appreciation of the nations concerned. So to announce would be, in effect, to say :— "Although by acting as you propose you would violate no rule, yet the consequences would be so injurious to me that I should throw my sword into the opposite scale." We should be acting in the spirit of the "Armed Neutralities" of 1780 and 1800. The expediency of so doing depends, first, upon the extent to which the success of our action would obviate the mischief against which it would be directed; and, secondly, upon the likelihood that the benefit which could be obtained only by imposing a new rule of international law *in invitos* would counterbalance the odium incurred by its imposition. On the former question it may be worth while to remind the mercantile community that, even under the Declaration of Paris, neutral trade must inevitably be put to much inconvenience. Any merchant vessel may be stopped with a view to the verification of her national character, of which the flag is no conclusive evidence. She is further liable to be visited and searched on suspicion of being engaged in the carriage of contraband, or of enemy military persons, or of despatches, or in running a blockade. Should the commander of the visiting cruiser have "probable cause" for suspecting any of these things, though the vessel is in fact innocent of them, he is justified in putting a prize crew on board and sending her into port with a view to the institution of proceedings against her in a prize Court.

A non-signatory of the Declaration of Paris may investigate and penalise, in addition to the above-mentioned list of offences, the carriage of enemy goods. This is, no doubt, by far the most important branch of the trade which is carried on for belligerents by neutrals, but it must not be forgotten that even were this branch of trade universally indulged, in accordance with the Declaration of Paris, neutral commerce would still remain liable to infinite annoyance from visit and search, with its possible sequel in a prize Court.

The question of the balance between benefit to be gained and odium to be incurred by insisting upon freedom to carry the goods of belligerents I leave to the politicians.

I am, Sir, your obedient servant,

T. E. Holland.

The Athenæum, April 16 (1898).

OUR MERCANTILE MARINE IN WAR TIME

Sir,—To-day's debate should throw some light upon the views of the Government, both as to existing rules of international law and as to the policy demanded by the interests of British trade. It is, however, possible that the Government may decline to anticipate the terms of the Declaration of Neutrality which they may too probably find themselves obliged to issue in the course of the next few days, and it is not unlikely that the law officers may decline to advise shipowners upon questions to which authoritative replies can be given only with reference to concrete cases by a prize Court.

You may perhaps, therefore, allow me in the meantime

to supplement my former letter by a few remarks, partly suggested by what has since been written upon the subject.

It is really too clear for argument that privateers are not, and cannot be treated, as pirates.

Sir George Baden-Powell still fails to see that the Declaration of Paris was not a piece of legislation, but a contract, producing no effect upon the rights and duties of nations which were not parties to it. We did not thereby, as he supposes, "decline to recognise private vessels of war as competent to use force as neutral merchantmen." We merely bound ourselves not to use such vessels for such a purpose. Sir George is still unable to discover for privateers any other category than the "*status* of pirate." He admits that it would not be necessary for their benefit to resort to "the universal use of the fore-yardarm." Let me assure him that the bearer of a United States private commission of war would run no risk even of being hanged at Newgate. President Lincoln, it is true, at the outset of the Civil War, threatened to treat as pirates vessels operating under the "pretended authority" of the rebel States; but he was speedily instructed by his own law Courts—*e.g.* in the *Savannah* and in the *Golden Rocket* (insurance) cases—that even such vessels were not pirates *iure gentium*. It is also tolerably self-evident that we cannot absolutely "close" our ports to any class of vessels. There is no inconsistency here between my friend Sir Sherston Baker and myself. We can discourage access, and of course, by refusal of coal, render egress impossible for privateers. Mr. Coltman would apparently be inclined to carry this policy so far that he would disarm and intern even belligerent ships of war which

should visit our ports. A somewhat hazardous innovation, one would think.

It is quite possible that the question of privateering may not become a practical one during the approaching war. Both parties may expressly renounce the practice, or they may follow the example of Prussia in 1870, and Russia at a later date in commissioning fast liners under the command of naval officers; a practice, by-the-by, which is not, as Sir George seems to think, "right in the teeth of the Declaration of Paris." See Lord Granville's despatch in 1870.

On Sir George's proposals with reference to the carriage of enemy goods, little more need be said, except to deprecate arguments founded upon the metaphorical statement that "a vessel is part of the territory covered by her flag," a statement which Lord Stowell found it necessary to meet by the assertion that a ship is a "mere movable." There can be no possible doubt of the right, under international law, of Spain and the United States to visit and search neutral ships carrying enemy's goods, and to confiscate such goods when found. They may also visit and search on many other grounds, and the question (one of policy) is whether, rather than permit this addition to the list, we choose to take a step which would practically make us belligerent. This question also, it may be hoped, will not press for solution.

In any case, let me express my cordial concurrence with your hope that, when hostilities are over, some really universal and lasting agreement may be arrived at with reference to the matters dealt with, as I venture to think prematurely, by the Declaration of Paris. A reform of

maritime law to which the United States are not a party is of little worth. That search for contraband of war can ever be suppressed I do not believe, and fear that it may be many years before divergent national interests can be so far reconciled as to secure an agreement as to the list of contraband articles. In the meantime this country is unfortunately a party to the astonishing piece of draftsmanship, the "three rules" of the Treaty of Washington, to which less reference than might have been expected has been made in recent discussions. The ambiguities of this document, which have prevented it from ever being, as was intended, brought to the notice of the other Powers, with a view to their acceptance of it, are such that its redrafting, or, better still, its cancellation, should be the first care of both contracting parties when the wished-for congress shall take place.

May I add that no serious student of international law is likely either to overrate the authority which it most beneficially exercises, or to conceive of it as an unalterable body of theory.

I am, Sir, your obedient servant,

T. E. Holland.

Brighton, April 21 (1898).

OUR MERCANTILE MARINE IN WAR

Sir,—Let me assure Sir George Baden-Powell that if, as he seems to think, I have been unsuccessful in grasping the meaning of his very interesting letters, it has not been from neglect to study them with the attention which is due to anything which he may write. How privateering, previously innocent, can have become piratical, *i.e.* an

offence, everywhere justiciable, against the Law of Nations, if the Declaration of Paris was not in the nature of a piece of legislation, I confess myself unable to understand; but have no wish to repeat the remarks which you have already allowed me to make upon the subject.

I shall, however, be glad at once to remove the impression suggested by Sir George's letter of this morning, that Article VII. of the Spanish Decree of April 24 has any bearing upon the legitimacy of privateering generally. The article in question (following, by-the-by, the very questionable precedent of a notification issued by Admiral Baudin, during the war between France and Mexico in 1839) merely threatens with punishment neutrals who may accept letters of marque from a belligerent Government.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, April 27 (1898).

(*Mines*)

On the views expressed in the first of the two letters which follow, as also in the writer's British Academy paper on *Neutral Duties* as translated in the *Marine Rundschau*, see Professor von Martitz of Berlin, in the *Transactions* of the International Law Association, 1907.

The topic has since been dealt with in The Hague Convention, No. viii. of 1907. By Art. 1 it is forbidden "(1) to lay unanchored automatic contact mines, unless they are so constructed as to become harmless one hour at most after he who has laid them has lost control over them; (2) to lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings; (3) to employ torpedoes which do not become harmless when they have missed their mark." By Art. 2 (which is, however, not accepted by France or Germany), it is forbidden "to lay automatic contact mines off

the coast and ports of an enemy, with the sole object of intercepting commercial navigation."

MINES IN THE OPEN SEA

Sir,—The question raised in your columns by Admiral de Horsey with reference to facts as to which we are as yet imperfectly informed well illustrates the perpetually recurring conflict between belligerent and neutral interests. They are, of course, irreconcilable, and the rights of the respective parties can be defined only by way of compromise. It is beyond doubt that the theoretically absolute right of neutral ships, whether public or private, to pursue their ordinary routes over the high seas in time of war, is limited by the right of the belligerents to fight on those seas a naval battle, the scene of which can be approached by such ships only at their proper risk and peril. In such a case the neutral has ample warning of the danger to which he would be exposed did he not alter his intended course. It would, however, be an entirely different affair if he should find himself implicated in belligerent war risks, of the existence of which it was impossible for him to be informed, while pursuing his lawful business in waters over which no nation pretends to exercise jurisdiction.

It is certain that no international usage sanctions the employment by one belligerent against the other of mines, or other secret contrivances, which would, without notice, render dangerous the navigation of the high seas. No belligerent has ever asserted a right to do anything of the kind ; and it may be in the recollection of your readers that strong disapproval was expressed of a design, erroneously

attributed to the United States a few years since, of effecting the blockade of certain Cuban ports by torpedoes, instead of by a cruising squadron. These, it was pointed out, would superadd to the risk of capture and confiscation, to which a blockade-runner is admittedly liable, the novel penalty of total destruction of the ship and all on board.

It may be worth while to add, as bearing upon the question under discussion, that there is a tendency in expert opinion towards allowing the line between "territorial waters" and the "high seas" to be drawn at a considerably greater distance than the old measurement of three miles from the shore.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, May 23 (1904).

TERRITORIAL WATERS

Sir,—Most authorities would, I think, agree with Admiral de Horsey that the line between "territorial waters" and "the high seas" is drawn by international law, if drawn by it anywhere, at a distance of three miles from low-water-mark. In the first place the ridiculously wide claims made, on behalf of certain States, by mediæval jurists were cut down by Grotius to so much water as can be controlled from the land. The Grotian formula was then worked out by Bynkershoek with reference to the range of cannon; and, finally, this somewhat variable test was, before the end of the eighteenth century, as we may see from the judgments of Lord Stowell, superseded by the hard-and-fast rule of the three-mile limit, which has since

received ample recognition in treaties, legislation, and judicial decisions.

The subordinate question, also touched upon by the Admiral, of the character to be attributed to bays, the entrance to which exceeds six miles in breadth, presents more difficulty than that relating to strictly coastal waters. I will only say that the Privy Council, in *The Direct U.S. Cable Co.* v. *Anglo-American Telegraph Co.* (L.R. 2 App. Ca. 394), carefully avoided giving an opinion as to the international law applicable to such bays, but decided the case before them, which had arisen with reference to the Bay of Conception, in Newfoundland, on the narrow ground that, as a British Court, they were bound by certain assertions of jurisdiction made in British Acts of Parliament.

The three-mile distance has, no doubt, become inadequate in consequence of the increased range of modern cannon, but no other can be substituted for it without express agreement of the Powers. One can hardly admit the view which has been maintained, *e.g.* by Professor de Martens, that the distance shifts automatically in accordance with improvements in artillery. The whole matter might well be included among the questions relating to the rights and duties of neutrals, for the consideration of which by a conference, to be called at an early date, a wish was recorded by The Hague Conference of 1899.

In the meantime it may be worth while to call attention to the view of the subject taken by a specially qualified and representative body of international experts. The Institut de Droit International, after discussions and inquiries which had lasted for several years, adopted, at their Paris meeting in 1894, the following resolutions, as a statement of what,

in the opinion of the Institut, would be reasonable rules with reference to territorial waters (I cite only those bearing upon the extent of such waters) :—

"Art. 2.—La mer territoriale s'étend à six milles marins (60 au degré de latitude) de la laisse de basse marée sur toute l'étendue des côtes. Art. 3.—Pour les baies, la mer territoriale suit les sinuosités de la côte, sauf qu'elle est mesurée à partir d'une ligne droite tirée en travers de la baie, dans la partie la plus rapprochée de l'ouverture vers la mer, où l'écart entre les deux côtes de la baie est de douze milles marins de largeur, à moins qu'un usage continu et séculaire n'ait consacré une largeur plus grande. Art. 4.—En cas de guerre, l'état riverain neutre a le droit de fixer, par la déclaration de neutralité, ou par notification spéciale, sa zone neutre au dela de six milles, jusqu'à portée du canon des côtes. Art. 5.—Tous les navires sans distinction ont le droit de passage inoffensif par la mer territoriale, sauf le droit des belligérants de règlementer et, dans un but de défense, de barrer le passage dans la dite mer pour tout navire, et sauf le droit des neutres de règlementer le passage dans la dite mer pour les navires de guerre de toutes nationalités." (*Annuaire de l'Institut*, t. xiii. p. 329.)

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, June 1 (1904).

(*Cable-cutting*)

With the letters which follow, compare the article by the same writer on "Les câbles sous-marins en temps de guerre," in the *Revue de Droit International Privé*, 1898, p. 648.

The topic of cable-cutting, as to which the Institut de Droit International arrived in 1879 at the conclusions set out in the first of these letters, was again taken into consideration by the Institut in 1902 ; see the *Annuaire* for that year, pp. 301–332.

The Hague Convention, No. iv. of 1907, provides, in Art. 54, that "submarine cables connecting occupied territory with a neutral territory shall not be destroyed or seized, unless in case of absolute necessity. They must be restored, and compensation must be arranged for them at the peace."

Convention No. v., by Art. 3, forbids belligerents (1) to install on neutral territory a radio-telegraphic station, or any other

apparatus, for communicating with their land or sea forces; (2) to employ such apparatus, established by them there before the war, for purely military purposes. By Art. 5, a neutral Power is bound to permit nothing of the sort.

SUBMARINE CABLES

Sir,—The possibility of giving some legal protection to submarine cables has been carefully considered by the Institut de Droit International. A committee was appointed in 1878 to consider the subject, and the presentation of its report to the meeting at Brussels in 1879 was followed by an interesting discussion (see the *Annuaire de l'Institut*, 1879–80, pp. 351–394). The conclusions ultimately adopted by the Institut were as follows :—

"1. It would be very useful if the various States would come to an understanding to declare that destruction of, or injury to, submarine cables in the high seas is an offence under the Law of Nations, and to fix precisely the wrongful character of the acts, and the appropriate penalties. With reference to the last-mentioned point, the degree of uniformity attainable must depend on the amount of difference between systems of criminal legislation. The right of arresting offenders, or those presumed to be such, might be given to the public vessels of all nations, under conditions regulated by treaties, but the right to try them should be reserved to the national Courts of the vessel arrested.

"2. A submarine telegraphic cable uniting two neutral territories is inviolable. It is desirable that, when telegraphic communication must be interrupted in consequence of war, a belligerent should confine himself to such measures as are absolutely necessary to prevent the cable from being used, and that such measures should be discontinued, or that any damage caused by them should be repaired as soon as the cessation of hostilities may permit."

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, November 23 (1881).

SUBMARINE CABLES IN TIME OF WAR

Sir,—I venture to think that the question which has been raised as to the legitimacy of cable-cutting is not so insoluble as most of the allusions to it might lead one to suppose. It is true that no light is thrown upon it by the Convention of 1884, which relates exclusively to time of peace, and was indeed signed by Lord Lyons, on behalf of Great Britain, only with an express reservation to that effect. Nor are we helped by the case to which attention was called in your columns some time since by Messrs. Eyre and Spottiswoode. Their allusion was doubtless to the *International* (L.R. 3 A. and E. 321), which is irrelevant to the present inquiry. The question is a new one, but, though covered by no precedent, I cannot doubt that it is covered by certain well-established principles of international law, which, it is hardly necessary to remark, is no cut-and-dried system but a body of rules founded upon, and moving with, the public opinion of nations.

That branch of international law which deals with the relations of neutrals and belligerents is, of course, a compromise between what Grotius calls the "belli rigor" and the "commerciorum libertas." The terms of the compromise, originally suggested partly by equity, partly by national interest, have been varied and re-defined, from time to time, with reference to the same considerations. It is perhaps reasonable that, in settling these terms, preponderant weight should have been given to the requirements of belligerents, engaged possibly in a life and death struggle. "Jus commerciorum æquum est," says Gentili; "at hoc æquius, tuendæ salutis." There is accordingly no doubt that in land

warfare a belligerent may not only interrupt communications by road, railway, post, or telegraph without giving any ground of complaint to neutrals who may be thereby inconvenienced, but may also lay hands on such neutral property—shipping, railway carriages, or telegraphic plant—as may be essential to the conduct of his operations, making use of and even destroying it, subject only to a duty to compensate the owners. This he does in pursuance of the well-known "droit d'angarie," an extreme application of which occurred in 1871, when certain British colliers were sunk in the Seine by the Prussians in order to prevent the passage of French gunboats up the river. Count Bismarck undertook that the owners of the ships should be indemnified, and Lord Granville did not press for anything further. Such action, if it took place outside of belligerent territory, would not be tolerated for a moment.

The application of these principles to the case of submarine cables would appear to be, to a certain point at any rate, perfectly clear. Telegraphic communication with the outside world may well be as important to a State engaged in warfare as similar means of communication between one point and another within its own territory. Just as an invader would without scruple interrupt messages, and even destroy telegraphic plant, on land, so may he thus act within the enemy's territorial waters, or, perhaps, even so far from shore as he could reasonably place a blockading squadron. It may be objected that a belligerent has no right to prevent the access of neutral ships to unblockaded portions of the enemy's coast on the ground that by carrying diplomatic agents or despatches they are keeping up the communications of his enemy with neutral Governments.

But this indulgence rests on the presumption that such official communications are "innocent," a presumption obviously inapplicable to telegraphic messages indiscriminately received in the course of business. It would seem, therefore, to be as reasonable as it is in accordance with analogy that a belligerent should be allowed, within the territorial waters of his enemy, to cut a cable, even though it may be neutral property, of which the *terminus ad quem* is enemy territory, subject only to a liability to indemnify the neutral owners.

The cutting, elsewhere than in the enemy's waters, of a cable connecting enemy with neutral territory receives no countenance from international law. Still less permissible would be the cutting of a cable connecting two neutral ports, although messages may pass through it which, by previous and subsequent stages of transmission, may be useful to the enemy.

Your obedient servant,

T. E. Holland.

Oxford, May 21 (1897).

SUBMARINE CABLES IN TIME OF WAR

Sir,—Will you allow me to refer in a few words to the interesting letters upon the subject of submarine cables which have been addressed to you by Mr. Parsoné and Mr. Charles Bright? In asserting that "the question as to the legitimacy of cable-cutting is covered by no precedent," I had no intention of denying that belligerent interference with cables had ever occurred. International precedents are made by diplomatic action (or deliberate inaction) with

reference to facts, not by those facts themselves. To the best of my belief no case of cable-cutting has ever been made matter of diplomatic representation, and I understand Mr. Parsoné to admit that no claim in respect of damage to cables was presented to the mixed Commission appointed under the Convention of 1883 between Great Britain and Chile.

In the course of his able address upon "Belligerents and Neutrals," reported in your issue of this morning, I observe that Mr. Macdonell suggests that the Institut de Droit International might usefully study the question of cables in time of war. It may, therefore, be well to state that this service has already been rendered. The Institut, at its Paris meeting in 1878, appointed a committee, of which M. Renault was chairman, to consider the whole subject of the protection of cables, both in peace and in war; and at its Brussels meeting, in 1879, carefully discussed the exhaustive report of its committee and voted certain "conclusions," notably the following:—

"Le câble télégraphique sous-marin qui unit deux territoires neutres est inviolable.

"Il est à désirer, quand les communications télégraphiques doivent cesser par suite de l'état de guerre, que l'on se borne aux mesures strictement nécessaires pour empêcher l'usage du câble, et qu'il soit mis fin à ces mesures, ou que l'on en répare les conséquences, aussitôt que le permettra la cessation des hostilités."

It was in no small measure due to the initiative of the Institut that diplomatic conferences were held at Paris, which in 1882 produced a draft convention for the protection of cables, not restricted in its operation to time of peace; and in 1884 the actual convention, which is so restricted.

It may not be generally known that in 1864, before the

difficulties of the subject were thoroughly appreciated, a convention was signed, though it never became operative, by which Brazil, Hayti, Italy, and Portugal undertook to recognise the "neutrality" in time of war of a cable to be laid by one Balestrini. So, in 1869, the United States were desirous of concluding a general convention which should assimilate the destruction of cables in the high seas to piracy, and should continue to be in force in time of war. The Brussels conference of 1874 avoided any mention of "câbles sous-marins."

The moral of all that has been written upon this subject is obviously that drawn by Mr. Charles Bright—*viz.* "the urgent necessity of a system of cables connecting the British Empire by direct and independent means—*i.e.* without touching on foreign soil."

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, June 3 (1897).

Section 5

Destruction of Prizes

A British ship, the *Knight Commander*, bound from New York to Yokohama and Kobe, was stopped on July 23, 1904, by a Russian cruiser, and as her cargo consisted largely of railway material, was considered to be engaged in carriage of contraband. Her crew and papers were taken on board the cruiser, and she was sent to the bottom by fire from its guns. The reasons officially given for this proceeding were that: "The proximity of the enemy's port, the lack of coal on board the vessel to enable her to be taken into a Russian port, and the impossibility of supplying her with coal from one of the Russian cruisers, owing

to the high seas running at the time, obliged the commander of the Russian cruiser to sink her."

The Russian Regulations as to Naval Prize, Art. 21, allowed a commander "in exceptional cases, when the preservation of a captured vessel appears impossible on account of her bad condition or entire worthlessness, the danger of her recapture by the enemy, or the great distance or blockade of ports, or else on account of danger threatening the ship which has made the capture, or the success of her operations," to burn or sink the prize.

The Japanese Regulations, Art. 91, were to the same effect in cases where the prize (1) cannot be navigated owing to her being unseaworthy, or to dangerous seas; (2) is likely to be recaptured by the enemy; (3) cannot be navigated without depriving the ship-of-war of officers and men required for her own safety.

The case of the *Knight Commander* was the subject of comment, on the 27th of the same month, in both Houses of Parliament. In the House of Lords, Lord Lansdowne spoke of what had occurred as "a very serious breach of international law," "an outrage," against which it had been considered "a duty to lodge a strong protest." In the House of Commons, Mr. Balfour described it as "entirely contrary to the accepted practice of civilised nations." Similar language was used in Parliament on August 10, when Mr. Gibson Bowles alluded to my letter of the 6th, in a way which gave occasion for that of the 14th.

The *Knight Commander* was condemned by the Prize Court at Vladivostok on August 16, 1904, and the sentence was confirmed on December 5, 1905, by the Court of Appeal at St. Petersburg, which found it "impossible to agree that the destruction of a neutral vessel is contrary to the principles of international law." The Russian Government has remained firm on the point, and in 1908 declined to submit the case to arbitration.

The Institut de Droit International in its *Code des Prises maritimes*, Art. 50 (not, be it observed, professing to state the law as it is, but as it should be), had taken a view in accordance with that maintained by the British Government (*Annuaire*, t. ix. p. 200; *Tableau*, p. 205), but it was, however, the opinion of the present writer, as will appear from the following letters, that no rule of international law, by which the sinking of even neutral

prizes was absolutely prohibited, could be shown to exist. He had previously touched upon this question in his evidence before the Royal Commission on the Supply of Food, &c., in Time of War, on November 4, 1903, and returned to it later in his paper upon the "Duties of Neutrals," read to the British Academy on April 12, 1905 (*Transactions*, ii. p. 66, and separately in French), cited in the judgment of the St. Petersburg Court of Appeal in the case of the *Knight Commander*.

The subsequent history of the question, of which some account will be given at the end of this section, may be claimed in favour of the correctness of the opinion maintained in the letters.

RUSSIAN PRIZE LAW

Sir,—The neutral Powers have serious ground of complaint as to the mode in which Russia is conducting operations at sea. It may, however, be doubted whether public opinion is sufficiently well informed to be capable of estimating the comparative gravity of the acts which are just now attracting attention. Putting aside for the moment questions arising out of the Straits Convention of 1856, as belonging to a somewhat different order of ideas, we may take it that the topics most needing careful consideration relate to removal of contraband from the ship that is carrying it without taking her in for adjudication; interference with mail steamers and their mail bags; perversely wrong decisions of Prize Courts; confiscation of ships as well as of their contraband cargo; destruction of prizes at sea; the list of contraband. Of these topics, the two last mentioned are probably the most important, and on each of these I will ask you to allow me to say a few words.

1. There is no doubt that by the Russian regulations of 1895, Article 21; and instructions of 1901, Article 40, officers are empowered to destroy their prizes at sea, no distinction

being drawn between neutral and enemy property, under such exceptional circumstances as the bad condition or small value of the prize, risk of recapture, distance from a Russian port, danger to the Imperial cruiser or to the success of her operations. The instructions of 1901, it may be added, explain that an officer "incurs no responsibility whatever" for so acting if the captured vessel is really liable to confiscation and the special circumstances imperatively demand her destruction. It is fair to say that not dissimilar, though less stringent, instructions were issued by France in 1870 and by the United States in 1898; also that, although the French instructions expressly contemplate "l'établissement des indemnités à attribuer aux neutres," a French Prize Court in 1870 refused compensation to neutral owners for the loss of their property on board of enemy ships burnt at sea.

The question, however, remains whether such regulations are in accordance with the rules of international law. The statement of these rules by Lord Stowell, who speaks of them as "clear in principle and established in practice," may, I think, be summarised as follows: An enemy's ship, after her crew has been placed in safety, may be destroyed. Where there is any ground for believing that the ship, or any part of her cargo, is neutral property, such action is justifiable only in cases of "the gravest importance to the captor's own State," after securing the ship's papers and subject to the right of neutral owners to receive full compensation (*Actæon*, 2 Dods. 48; *Felicity*, *ib.* 381; substantially followed by Dr. Lushington in *Leucade*, Spinks, 221). It is not the case, as is alleged by the *Novoe Vremya*, that any British regulations "contain the same provisions as the

Russian" on this subject. On the contrary, the Admiralty Manual of 1888 allows destruction of enemy vessels only; and goes so far in the direction of liberality as to order the release, without ransom, of a neutral prize which either from its condition, or from lack of a prize crew, cannot be sent in for adjudication. The Japanese instructions of 1894 permit the destruction of only enemy vessels; and Article 50 of the carefully debated "Code des prises" of the Institut de Droit International is to the same effect. It may be worth while to add that the eminent Russian jurist, M. de Martens, in his book on international law, published some twenty years ago, in mentioning that the distance of her ports from the scenes of naval operations often obliges Russia to sink her prizes, so that "ce qui les lois maritimes de tous les états considèrent comme un moyen auquel il n'y a lieu de recourir qu'à la dernière extrémité, se transformera nécessairement pour nous en règle normale," foresaw that "cette mesure d'un caractère général soulévera indubitablement contre notre pays un mécontentement universel."

2. A far more important question is, I venture to think, raised by the Russian list of contraband, sweeping, as it does, into the category of "absolutely contraband" articles things such as provisions and coal, to which a contraband character, in any sense of the term, has usually been denied on the Continent, while Great Britain and the United States have admitted them into the category of "conditional" contraband, only when shown to be suitable and destined for the armed forces of the enemy, or for the relief of a place besieged. Still more unwarrantable is the Russian claim to interfere with the trade in raw cotton. Her prohibition of this trade is wholly unprecedented, for the treatment of

cotton during the American Civil War will be found on examination to have no bearing on the question under consideration. I touch to-day upon this large subject only to express a hope that our Government, in concert, if possible, with other neutral Governments, has communicated to that of Russia, with reference to its list of prohibited articles, a protest in language as unmistakable as that employed by our Foreign Office in 1885:—"I regret to have to inform you, M. l'Ambassadeur," wrote Lord Granville, "that Her Majesty's Government feel compelled to take exception to the proposed measure, as they cannot admit that, consistently with the law and practice of nations, and with the rights of neutrals, provisions in general can be treated as contraband of war." A timely warning that a claim is inadmissible is surely preferable to waiting till bad feeling has been aroused by the concrete application of an objectionable doctrine.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, August 1 (1904).

RUSSIAN PRIZE LAW

Sir,—From this hilltop I observe that, in the debate of Thursday last, Mr. Gibson Bowles, alluding to a letter of mine which appeared in your issue of August 6, complained that I "had not given the proper reference" to Lord Stowell's judgments. Mr. Bowles seems to be unaware that in referring to a decided case the page mentioned is, in the absence of any indication to the contrary, invariably that on which the report of the case commences. I may, perhaps, also be allowed to say that he, in my opinion, misapprehends the

effect of the passage quoted by him from the *Felicity*, which decides only that, whatever may be the justification for the destruction of a neutral prize, the neutral owner is entitled, as against the captor, to full compensation for the loss thereby sustained.

I am, Sir, your obedient servant,

T. E. Holland.

Eggishorn, Valais, Suisse, August 14 (1904).

RUSSIAN PRIZE LAW

Sir,—Mr. Gibson Bowles has, I find, addressed to you a letter in which he attempts to controvert two statements of mine by the simple expedient of omitting essential portions of each of them.

1. Mr. Bowles having revealed himself as unaware that the mode in which I had cited a group of cases upon destruction of prizes was the correct mode, I thought it well to provide him with the rudimentary information that, "in referring to a decided case, the page mentioned is, *in the absence of any indication to the contrary*, invariably that on which the report of the case commences." He replies that he has found appended to a citation of a passage in a judgment the page in which this passage occurs. May I refer him, for an explanation of this phenomenon, to the words (now italicised) omitted in his quotation of my statement? It is, of course, common enough, when the reference is obviously not to the case as a whole but to an extract from it, thus to give a clue to the extract, the formula then employed being frequently "*at* page so-and-so."

2. I had summarised the effect, as I conceive it, of the

group of cases above mentioned in the following terms :— "Such action is justifiable only in cases of the gravest importance to the captor's own State, *after securing the ship's papers, and subject to the right of the neutral owners to receive full compensation.*" Here, again, while purporting to quote me, Mr. Bowles omits the all-important words now italicised. I am, however, maltreated in good company. Mr. Bowles represents Lord Stowell as holding that destruction of neutral property cannot be justified, even in cases of the gravest importance to the captor's own State. What Lord Stowell actually says, in the very passage quoted by Mr. Bowles, is that "to the neutral it can only be justified, under any such circumstances, by a full restitution in value." I would suggest that Mr. Bowles should find an opportunity for reading *in extenso* the reports of the *Actæon* (2 Dods. 48) and the *Felicity* (*ib.* 381), as also for re-reading the passage which occurs at p. 386 of the latter case, before venturing further into the somewhat intricate technicalities of prize law.

I am, Sir, your obedient servant,

T. E. Holland.

Eggishorn, Suisse, August 26 (1904).

THE SINKING OF NEUTRAL PRIZES

Sir,—In your St.Petersburg correspondence of yesterday I see that some reference is made to what I have had occasion to say from time to time upon the vexed question of the sinking of neutral vessels, and your Correspondent thinks it "would be decidedly interesting" to know whether I have really changed my opinion on the subject. Perhaps, therefore, I may be allowed to state that my opinion on the

subject has suffered no change, and may be summarised as follows :—

1. There is no established rule of international law which absolutely forbids, under any circumstances, the sinking of a neutral prize. A *consensus gentium* to this effect will hardly be alleged by those who are aware that such sinking is permitted by the most recent prize regulations of France, Russia, Japan, and the United States.

2. It is much to be desired that the practice should be, by future international agreement, absolutely forbidden—that the lenity of British practice in this respect should become internationally obligatory.

3. In the meantime, to adopt the language of the French instructions, "On ne doit user de ce droit de destruction qu'avec la plus grande réserve"; and it may well be that any given set of instructions (*e.g.* the Russian) leaves on this point so large a discretion to commanders of cruisers as to constitute an intolerable grievance.

4. In any case, the owner of neutral property, not proved to be good prize, is entitled to the fullest compensation for his loss. In the language of Lord Stowell :—

> "The destruction of the property may have been a meritorious act towards his own Government; but still the person to whom the property belongs must not be a sufferer . . . if the captor has by the act of destruction conferred a benefit upon the public, he must look to his own Government for his indemnity."

It may be worth while to add that the published statements on the subject for which I am responsible are contained in the *Admiralty Manual of Prize Law* of 1888 (where section 303 sets out the lenient British instructions to commanders, without any implication that instructions of a

severer kind would have been inconsistent with international law); in letters which appeared in your columns on August 6, 17, and 30, 1904; and in a paper on "Neutral Duties in a Maritime War, as illustrated by recent events," read before the British Academy in April last, a French translation of which is in circulation on the Continent.

I am, Sir, your obedient servant,

T. E. Holland.

Temple, June 29 (1905).

The Russian circular of April 3, 1906, inviting the Powers to a second Peace Conference, included among the topics for discussion: "Destruction par force majeure des bâtiments de commerce neutres arrêtés comme prises," and the British delegates were instructed to urge the acceptance of what their Government had maintained to be the existing rule on the subject. The Conference of 1907 declined, however, to define existing law, holding that its business was solely to consider what should be the law in future. After long discussions, in the course of which frequent reference was made to views expressed by the present writer (see *Actes et Documents*, t. iii. pp. 991–993, 1010, 1016, 1018, 1048, 1171), the Conference failed to arrive at any conclusion as to the desirability of prohibiting the destruction of neutral prizes, and confined itself to the expression of a wish (*vœu*) that this, and other unsettled points in the law of naval warfare, should be dealt with by a subsequent Conference.

This question was, accordingly, one of those submitted to a Conference of ten maritime Powers, which was called together by Great Britain, for reasons upon which something will be said in the next section, and met in London on December 4, 1908.

The question of sinking was fully debated in this Conference, with the assistance of memoranda, in which the several Powers represented explained their divergent views upon it, and of reports prepared by committees specially appointed for the purpose. It soon became apparent that the British proposal for an absolute prohibition of the destruction of neutral prizes had no chance of being accepted; while, on the other hand, it was generally agreed that the practice is permissible only in

exceptional cases. (See *Parl. Paper, Miscell.* No. 5 (1909), pp. 2–53, 99–102, 120, 189, 205, 215, 223, 248, 268–278, 323, 365.) Articles 48–54 of the Declaration, signed by the delegates to the Conference on February 26, 1909, relate to this question. After laying down, in Art. 48, the general principle that "a neutral prize cannot be destroyed by the captor, but should be taken into such port as is proper for the legal decision of the rightfulness of the capture," the Declaration proceeds, in Art. 49, to qualify this principle by providing that "exceptionally, a neutral vessel captured by a belligerent warship, which would be liable to confiscation, may be destroyed, if obedience to Art. 48 might compromise the safety of the warship, or the success of the operations in which she is actually engaged."

Section 6

An International Prize Court

The forecast, incidentally attempted in the following letters, of the general results likely to be arrived at by the second Peace Conference, has been justified by the event. As much may be claimed for the views maintained in these letters upon the topic with which they were more specifically concerned. Instead of letting loose the judges of the proposed International prize Court to "make law," in accordance with what might happen to be their notions of "the general principles of justice and equity," a serious attempt has been made to supply them with a Code of the law which they would be expected to administer.

Some account will be given at the end of this section of the steps which have so far been taken towards the establishment of an International Court of Appeal in cases of prize.

AN INTERNATIONAL PRIZE COURT

Sir,—The idea suggested by the question addressed on February 19 to the Government by Mr. A. Herbert—*viz.* that the appeal in prize cases should lie, not to a Court belonging to the belligerent from whose Court of first

instance the appeal is brought, but to an international tribunal, has a plausible appearance of fairness, but involves many preliminary questions which must not be lost sight of.

Prize Courts are, at present, Courts of enquiry, to which a belligerent Government entrusts the duty of ascertaining whether the captures made by its officers have been properly made, according to the views of international law entertained by that Government. There exists, no doubt, among Continental jurists, a considerable body of opinion in favour of giving to Courts of Appeal, at any rate, in prize cases a wholly different character. This opinion found its expression in Articles 100–109 of the *Code des Prises Maritimes*, finally adopted at its Heidelberg meeting, in 1887, by the Institut de Droit International. Article 100 runs as follows:—

"Au début de chaque guerre, chacune des parties belligérantes constitue un tribunal international d'appel en matière de prises maritimes. Chacun de ces tribunaux est composé de cinq membres, designés comme suit: L'état belligérant nommera lui-même le président et un des membres. Il désignera en outre trois états neutres, qui choisiront chacun un des trois autres membres."

In the abstract, and supposing that a tribunal perfectly satisfactory both to belligerents and neutrals could be constituted, whether antecedently or *ad hoc*, there might be much to be said for the proposal; subject, however, to one condition—*viz.* that an agreement had been previously arrived at as to the law which the Court is to apply. At the present time there exists, on many vital questions of prize law, no such agreement. It will be sufficient to mention those relating to the list of contraband, the distinction between "absolute" and "conditional" contraband, the doctrine of "continuous voyages," the right of sinking a

neutral prize, the moment from which a vessel becomes liable for breach of blockade.

Just as the *Alabama* arbitration would have been impossible had not an agreement been arrived at upon the principles in accordance with which neutral duties as to the exit of ships of war were to be construed, so, also, before an international Court can be empowered to decide questions of prize, whether in the first instance or on appeal, it is indispensable that the law to be applied on the points above mentioned, and many others, should have been clearly defined and accepted, if not generally, at least by all parties concerned. The moral which I would venture to draw is, therefore, that although questions of fact, arising out of the capture of a prize, might sometimes be submitted to a tribunal of arbitration, no case, involving rules of law as to which nations take different views, could possibly be so submitted. One is glad, therefore, to notice that the Prime Minister's reply to Mr. A. Herbert was of the most guarded character. The settlement of the law of prize must necessarily precede any general resort to an international Prize Court; and if the coming Hague Conference does no more than settle some of the most pressing of these questions, it will have done much to promote the cause of peace.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, February 20 (1907).

A NEW PRIZE LAW

Sir,—The leading articles which you have recently published upon the doings of the Peace Conference, as also the weighty letter addressed to you by my eminent colleague,

Professor Westlake, will have been welcomed by many of your readers who are anxious that the vital importance of some of the questions under discussion at The Hague should not be lost sight of.

The Conference may now be congratulated upon having already given a *quietus* to several proposals for which, whether or not they may be rightly described as Utopian, the time is admittedly not yet ripe. Such has been the fate of the suggestions for the limitation of armaments, and for the exemption from capture of private property at sea. Such also, there is every reason to hope, is the destiny which awaits the still more objectionable proposals for rendering obligatory the resort to arbitration, which by the Convention of 1899 was wisely left optional.

Should the labours of the delegates succeed in placing some restrictions upon the employment of submarine mines, the bombardment of open coast towns, and the conversion of merchant vessels into ships of war ; in making some slight improvements in each of the three Conventions of 1899 ; and in solving some of the more pressing questions as to the rights and duties of neutrals, especially with reference to the reception in their ports of belligerent warships, it will have more than justified the hopes for its success which have been entertained by persons conversant with the difficulty and complexity of the problems involved.

But what shall we say of certain proposals for revolutionising the law of prize, which still remain for consideration, notably for the establishment of an international Court of Appeal, and for the abolition of contraband ? It can hardly be supposed that either suggestion will win its way to acceptance.

1. The British scheme for an international Court of Appeal in prize cases is, indeed, far preferable to the German ; but the objections to anything of the kind would seem to be, for the present, insuperable, were it only for the reason which you allowed me to point out, some months ago, *à propos* of a question put in the House of Commons by Mr. Arnold Herbert. As long as nations hold widely different views on many points of prize law, it cannot be expected that they should agree beforehand that, when belligerent, they will leave it to a board of arbitrators to say which of several competing rules shall be applied to any given case of capture, or to evolve out of their inner consciousness a new rule, hitherto unknown to any national prize Court. It would seem that the German advocates of the innovation claim in its favour the authority of the Institut de Droit International. Permit me, therefore, as one who has taken part in all the discussions of the Institut upon the subject, to state that when it was first handled, at Zürich, in 1878, the difficulties in the way of an international Court were insisted on by such men as Bluntschli, Bernard, Bulmerincq, Asser, and Neumann, and the vote of a majority in its favour was coupled with one which demanded the acceptance by treaty of a universally applicable system of prize law. The drafting of such a system was accordingly the main object of the *Code des Prises maritimes*, which, after occupying several sessions of the Institut, was finally adopted by it, at Heidelberg, in 1887. Only ten of the 122 sections of this Code deal with an international Court of Appeal. A complete body of law, by which States have agreed to be bound, must, one would think, necessarily precede the establishment of a mixed Court by which that law is to be interpreted.

2. While the several delegations are vying with one another in devising new definitions of contraband, there would seem to be little likelihood that the British proposal for its total abandonment will be seriously entertained. Such a step could be justified, if at all, from the point of view of national interest, only on the ground that it might possibly throw increased difficulties in the way of an enemy desirous, even by straining the existing law, of interfering with the supply of foodstuffs to the British islands. I propose, for the present, only to call attention to the concluding paragraph of the British notice of motion on this point, which would seem to imply much more than the abandonment of contraband. The words in question, if indeed they are authentically reported, are as follows :— "Le droit de visite ne serait exercé que pour constater le caractère neutre du bâtiment de commerce." Does this mean that the visiting officer, as soon as he has ascertained from the ship's papers that she is neutral property, is to make his bow, and return to the cruiser whence he came? If so, what has become of our existing right to detain any vessel which has sailed for a blockaded port, or is carrying, as a commercial venture, or even ignorantly, hostile troops or despatches? No such definition as is proposed of an "auxiliary ship of war" would safeguard the right in question, since a ship, to come within that definition, must, it appears, be under the orders of a belligerent fleet.

I would venture to suggest that the motto of a reformer of prize law should be *festina lente*. The existing system is the fruit of practical experience extending over several centuries, and, though it may need, here and there, some readjustment to new conditions, brought about by the

substitution of steam for sails, is not one which can safely be pulled to pieces in a couple of months. Let us leave something for future Hague Conferences.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, July 24 (1907).

A NEW PRIZE LAW

Sir,—In a letter under the above heading, for which you were so good as to find room in July last, I returned to the thesis which I had ventured to maintain some months previously, *à propos* of a question put in the House of Commons. My contention was that the establishment of an international prize Court, assuming it to be under any circumstances desirable, should follow, not precede, a general international agreement as to the law which the Court is to administer.

It would appear, from such imperfect information as intermittently reaches Swiss mountain hotels, that a conviction of the truth of this proposition is at length making way among the delegates to The Hague Conference and among observers of its doings. In a recent number of the *Courrier de la Conférence*, a publication which cannot be accused of lukewarmness in the advocacy of proposals for the peaceful settlement of international differences, I find an article entitled "Pas de Code Naval, pas de Cour des Prises," to the effect that "l'acceptation de la Cour des Prises est strictement conditionnelle à la rédaction du Code qu'elle aura à interpréter." Its decisions must otherwise be founded upon the opinions of its Judges, "the majority of whom will belong to a school which has never accepted what

Great Britain looks upon as the fundamental principles of naval warfare." One learns also, from other sources, that efforts are being made to arrive, by a series of compromises, at some common understanding upon the points as to which the differences of view between the Powers are most pronounced. It may, however, be safely predicted that many years must elapse before any such result will be achieved.

In the meantime, a very different solution of the difficulty has commended itself to the partisans of the proposed Court. M. Renault, the accomplished Reporter of the committee which deals in the first instance with the subject, after stating that "sur beaucoup de points le droit de la guerre maritime est encore incertain, et chaque État le formule au gré de ses idées et de ses intérêts," lays down that, in accordance with strict juridical reasoning, when international law is silent, an international Court should apply the law of the captor. He is, nevertheless, prepared to recommend, as the spokesman of the committee, that in such cases the Judges should decide "d'après les principes généraux de la justice et de l'équité"; a process which I had, less complimentarily, described as "evolving new rules out of their inner consciousness." The Court, in pursuance of this confessedly "hardie solution," would be called upon to "faire le droit."

One may be permitted to hope that this proposal will not be accepted. The beneficent action of English Judges in developing the common law of England may possibly be cited in its favour; but the analogy is delusive. The Courts of a given country in evolving new rules of law are almost certain to do so in accordance with the views of

public policy generally entertained in that country. Should they act otherwise their error can be promptly corrected by the national Legislature. Far different would be the effect of the decision of an international Court, in which, though it might run directly counter to British theory and practice, Great Britain would have bound herself beforehand to acquiesce. The only quasi-legislative body by which the *ratio decidendi* of such a decision could be disallowed would be an international gathering in which British views might find scanty support. The development of a system of national law by national Judges offers no analogy to the working of an international Court, empowered, at its free will and pleasure, to disregard the views of a sovereign Power as to the proper rule to be applied in cases as to which international law gives no guidance. In such cases the ultimate adjustment of differences of view is the appropriate work, not of a Law Court, but of diplomacy.

It is hardly necessary to combat the notion that there already exists, *in nubibus*, a complete system of prize law, which is in some mysterious way accessible to Judges, and reveals to them the rule applicable to each new case as it arises. This notion, so far as it is prevalent, seems to have arisen from a mistaken reading of certain *dicta* of Lord Stowell, in which that great Judge, in his finest 18th century manner, insists that the law which it was his duty to administer "has no locality" and "belongs to other nations as well as our own." He was, of course, thinking of the rules of prize law upon which the nations are agreed, not of the numerous questions upon which no agreement exists, and was dealing with the difficult position of a Judge who has to choose (as in the recent *Moray Firth* case) between obedience

to such rules and obedience to the legislative, or quasi-legislative, acts of his own Government.

I am, Sir, your obedient servant,

T. E. Holland.

Eggishorn, Suisse, September 16 (1907).

A NEW PRIZE LAW

Sir,—The speech of the Prime Minister at the Guildhall contains a paragraph which will be read with a sense of relief by those who, like myself, have all along viewed with surprise and apprehension The Hague proposals for an international Prize Court.

Sir H. Campbell-Bannerman admits that "it is desirable, and it may be essential, that, before legislation can be undertaken to make such a Court effective, the leading maritime nations should come to an agreement as to the rules regarding some of the more important subjects of warfare which are to be administered by the Court"; and his subsequent eulogy of the Court presupposes that it is provided with "a body of rules which has received the sanction of the great maritime Powers." What is said as to the necessary postponement of any legislation in the sense of The Hague Convention must, of course, apply *a fortiori* to the ratification of the Convention.

We have here, for the first time, an authoritative repudiation of the notion that fifteen gentlemen of mixed nationality composing an international Prize Court, are to be let loose to "make law," in accordance with what may happen to be their conceptions of "justice and equity." It seems at last to be recognised that such a Court cannot be set to work

unless, and until, the great maritime Powers shall have come to an agreement upon the rules of law which the Court is to administer.

I may add that it is surely too much to expect that the rules in question will be discussed by the Powers, to use Sir H. Campbell-Bannerman's phrase, "without any political *arrière pensée*." Compromise between opposing political interests must ever remain one of the most important factors in the development of the law of nations.

I am, Sir, your obedient servant,

T. E. Holland.

Oxford, November 11 (1907).

Although the establishment of an International Prize Court of Appeal was not one of the topics included in the programme of the Russian invitation to a second Peace Conference, no objection was made to its being taken into consideration, when proposals to that effect were made by the British and American delegates to the Conference. The idea seems first to have been suggested by Hübner, who proposed to confer jurisdiction in cases of neutral prize on courts composed of ministers, or consuls, accredited by neutrals to the belligerents, together with commissioners appointed by the Sovereign of the captors or of the country to which the prize has been brought, as also, perhaps, "des personnes pleines de probité et de connaissances dans tout ce qui concerne les Loix des Nations et les Traités des Puissances modernes." The Court is to decide in accordance with treaties, "ou, à leur défaut, la loi universelle des nations." *De la Saisie des Bâtiments neutres* (1759), ii. pp. 45–61. The Institut de Droit International, after discussions extending over several years, accepted the principle of an International Court of Appeal, though only in combination with a complete scheme of prize-law, in its *Code des Prises maritimes*, completed in 1887.

At the Conference of 1907, the work of several committees, and a masterly report by Professor Renault, *Parl. Papers*, No. iv. (1908), p. 9, resulted in The Hague Convention, No. xii.

of that year, providing for the establishment of a mixed Court of Appeal from national prize courts.

According to Art. 7 of this Convention, in default of any relevant treaty between the Governments of the litigant parties, and of generally recognised rules of international law bearing upon the question at issue, the Court is to decide "in accordance with the general principles of justice and equity." It seems, however, to have been soon perceived that the proposal to institute a Court, unprovided with any fixed system of law by which to decide the cases which might be brought before it, could not well be entertained, and the Final Act of the Conference accordingly expresses a wish that "the preparation of a *Règlement*, relative to the laws and customs of maritime war, may be mentioned in the programme of the next Conference."

Thereupon, without waiting for the meeting of a third Hague Conference, the British Government on February 27, 1908, addressed a circular to the great maritime Powers, which, after alluding to the impression gained "that the establishment of the International Prize Court would not meet with general acceptance so long as vagueness and uncertainty exist as to the principles which the Court, in dealing with appeals brought before it, would apply to questions of far-reaching importance, affecting naval policy and practice," went on to propose that another Conference should meet in London, in the autumn of the same year, "with the object of arriving at an agreement as to what are the generally recognised principles of international law, within the meaning of paragraph 2 of Article 7 of the Convention, as to those matters wherein the practice of nations has varied, and of then formulating the rules which, in the absence of special treaty provisions applicable to a particular case, the Court should observe in dealing with appeals brought before it for decision. . . . It would be difficult, if not impossible, for H. M. Government to carry the legislation necessary to give effect to the Convention, unless they could assure both Houses of the British Parliament that some more definite understanding had been reached as to the rules by which the new Tribunal should be governed."

In response to this invitation, delegates from ten principal maritime States assembled at the Foreign Office on December 4, 1908, and after discussing the topics to which their attention

was directed, *viz.* : (1) Contraband ; (2) Blockade ; (3) Continuous voyage ; (4) Destruction of neutral prizes ; (5) Unneutral service ; (6) Conversion of merchant vessels into warships on the high seas ; (7) Transfer to a neutral flag ; (8) Nationality or domicil, as the test of enemy property ; signed on February 26, 1909, the Declaration of London, to which so frequent reference has been made in the preceding pages.

Whether Convention No. xii. of 1907, or the Declaration which, it will be remembered, must be accepted, if at all, as a whole, will be generally ratified, remains to be seen. Neither one nor the other will, it has been announced, be ratified by Great Britain till opportunity has been given for its discussion in Parliament, probably upon the introduction of the Bill without the passing of which it will be impossible to give effect to the Convention, the ratification of which is now not to take place before June 1910.

INDEX

PRINTED BY
SPOTTISWOODE AND CO. LTD., COLCHESTER
LONDON AND ETON